THE GENERAL STATUTES OF
NORTH CAROLINA

-

ANNOTATED

-

1996 CUMULATIVE SUPPLEMENT
VOLUME 4

THE GENERAL STATUTES OF NORTH CAROLINA

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1996 CUMULATIVE SUPPLEMENT

Volume 4

Chapters 15 through 17E

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

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Annotated through 470 S.E.2d 425. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

MICHIE
Law Publishers
Charlottesville, Virginia
1996

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Preface

This Cumulative Supplement to Volume 4 contains the general laws of a permanent nature enacted by the General Assembly through the 1996 Second Extra Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1996 Second Extra Session affecting Chapters 15 through 17E of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 343, p. 303.
North Carolina Court of Appeals Reports through Volume 121, p. 513.
South Eastern Reporter 2nd Series through Volume 470, p. 425.
Federal Reporter 3rd Series through Volume 83, p. 1423.
Federal Supplement through Volume 924, p. 224.
Federal Rules Decisions through Volume 165, p. 700.
Bankruptcy Reports through Volume 195, p. 823.
Supreme Court Reporter through Volume 116, p. 1711.
North Carolina Law Review through Volume 74, p. 1319.
Wake Forest Law Review through Volume 30, p. 1008.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

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1996 Cumulative Supplement

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Chapter 15.
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ARTICLE 1.
General Provisions.

§ 15-1. Statute of limitations for misdemeanors.

Legal Periodicals. — For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

I. General Consideration.
II. Particular Offenses.

I. GENERAL CONSIDERATION.

Section Not Repealed. — There is no stated purpose in § 15A-641 that indicates the legislature intended to repeal this section. Furthermore, § 15A-641 appears to be an effort by the legislature to codify the common law that permitted the use of presentments by grand juries but prohibited the arrest and trial of defendants on a presentment. Thus, this section has not been repealed and remains a part of the law of this State; it would support the order of the trial court denying defendant's motion to dismiss. State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (1995).

Effect of Statute on Privilege Against Self-Incrimination. — A witness cannot invoke the privilege against self-incrimination where he is either immune from prosecution, or where prosecution is barred by statute of limitations. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

A legal limitation of time of prosecution is in practical effect expurgation of crime; so after the lapse of time fixed by law, the privilege against self-incrimination ceases. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Cited in State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

II. PARTICULAR OFFENSES.

Adultery is subject to two-year statute of limitations. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

§ 15-6. Imprisonment to be in county jail.

OPINIONS OF ATTORNEY GENERAL

This section has two prongs. First, it makes clear the type of facility in which a convicted defendant shall not serve a term of imprisonment, unless permitted under other legislation, and second, it provides that a person may only be sentenced to imprisonment in the county where the crime was committed. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Place of Imprisonment Where Sentence Is Less Than or Greater Than 180 Days. — Absent specific statutory authorization (see, e.g., §§ 15A-711, 148-32.1, 162-38 to 162-40), imprisonment of misdemeanants with sentences of 180 days or less must be in the local confinement facility of the county where the crime was committed. If the sentence is greater than 180 days, commitment may be either to such a local facility or to the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Section Overridden by § 15A-1352 as to Certain Criminals. — While § 15-6 applies to both felons and misdemeanants, § 15A-1352 overrides § 15-6 to the extent it provides for certain felons and misdemeanants to be sentenced to terms of imprisonment under the jurisdiction of the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Effect of § 15A-1352 on Section. — Section 15A-1352 is an exception to § 15-6 as to those misdemeanants with sentences of more than 180 days, because they may be sentenced to serve their term of imprisonment under the jurisdiction of the Department of Correction, but as to those not placed in the custody of the Department of Correction, the only effect of § 15A-1352 is to broaden the term "common jail" to include other types of local facilities which may be used under appropriate circumstances. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

County of Venue Irrelevant in Determining Place of Imprisonment. — Even though the venue of a criminal trial may properly be in a county other than the one in which the crime occurred, to the extent that § 15-6 applies, it requires imprisonment to be in the county jail of the county where the crime occurred. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

§ 15-10.2. Mandatory disposition of detainers — request for final disposition of charges; continuance; information to be furnished prisoner.

CASE NOTES

Stated in Howell v. Barker, 684 F. Supp. 132 (E.D.N.C. 1988).

ARTICLE 2.

Record and Disposition of Seized, etc., Articles.

§ 15-11.1. Seizure, custody and disposition of articles; exceptions.

(a) If a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial. Upon application by the lawful owner or a person, firm or corporation entitled to possession or upon his own determination, the district attorney may release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership. If the district attorney refuses to release such property, the lawful owner or a person, firm or corporation entitled to possession may make application to the court for return of the property. The court, after notice to all parties, including the defendant, and after hearing, may in its discretion order any or all of the property returned to the lawful owner or a person, firm or corporation entitled to possession. The court may enter such order as may be necessary to assure that the evidence will be available for use as evidence at the time of trial, and will otherwise protect the rights of all parties. Notwithstanding any other provision of law, photographs or other identification or analyses made of the property may be introduced at the time of the trial provided that the court determines that the introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.

(b) In the case of unknown or unapprehended defendants or of defendants willfully absent from the jurisdiction, the court shall have discretion to appoint a guardian ad litem, who shall be a licensed attorney, to represent and protect the interest of such unknown or absent defendants. The judicial findings concerning identification or value that are made at such hearing whereby property is returned to the lawful owner or a person, firm, or corporation entitled to possession, may be admissible into evidence at the trial. After final judgment all property lawfully seized by or otherwise coming into the possession of law-enforcement authorities shall be disposed of as the court or magistrate in its discretion orders, and may be forfeited and either sold or destroyed in accordance with due process of law.

(b1) Notwithstanding subsections (a) and (b) of this section or any other provision of law, if the property seized is a firearm and the district attorney determines the firearm is no longer necessary or useful as evidence in a criminal trial, the district attorney, after notice to all parties known or believed by the district attorney to have an ownership or a possessory interest in the firearm, including the defendant, shall apply to the court for an order of disposition of the firearm. The judge, after hearing, may order the disposition of the firearm in one of the following ways:

(1) By ordering the firearm returned to its rightful owner, when the rightful owner is someone other than the defendant and upon findings by the court (i) that the person, firm, or corporation determined by the court to be the rightful owner is entitled to possession of the firearm and (ii) that the person, firm, or corporation determined by the court to be the rightful owner of the firearm was unlawfully deprived of the same or had no knowledge or reasonable belief of the defendant's intention to use the firearm unlawfully.

(2) By ordering the firearm returned to the defendant, but only if the defendant is not convicted of any criminal offense in connection with the possession or use of the firearm, the defendant is the rightful owner of the firearm, and the defendant is not otherwise ineligible to possess such firearm.

(3) By ordering the firearm turned over to be destroyed by the sheriff of the county in which the firearm was seized or by his duly authorized agent. The sheriff shall maintain a record of the destruction of the firearm.

This subsection (b1) is not applicable to seizures pursuant to G.S. 113-137 of firearms used only in connection with a violation of Article 22 of Chapter 113 of the General Statutes or any local wildlife hunting ordinance.

(c) Any property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith. (1977, c. 613; 1979, c. 593; 1994, Ex. Sess., c. 16, s. 1.)

CASE NOTES

Federal Procedures. — Assuming, without deciding, police department violated § 15-11.1(a) by transferring cash seized under § 90-112 to the federal DEA rather than to North Carolina Board of Education, the United States may adopt a seizure even when the person who seized the property had no authority to do so. United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

Where the State did not seek forfeiture under § 90-112, the U.S. Attorney General did not abuse his discretion by not discontinuing the federal forfeiture proceeding and by following the equitable sharing provisions of 21 U.S.C.A. § 881(e)(1)(A) and 19 U.S.C.A. § 1616a(c)(1)(B)(ii). United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

A violation of this section does not mandate dismissal of the charges against defendant. State v. Mlo, 335 N.C. 353, 440 S.E.2d 98, cert. denied, — U.S. —, 114 S. Ct. 2716, 129 L. Ed. 2d 841 (1994).

Where a car was released to the executor of the victim's estate without the authority of the district attorney or the court charges were not dismissed. State v. Mlo, 335 N.C. 353, 440 S.E.2d 98, cert. denied, — U.S. —, 114 S. Ct. 2716, 129 L. Ed. 2d 841 (1994).

Seizure of Currency. — Where law enforcement seized currency as potential evidence, once the district attorney determined that the evidence was not needed at trial, he had complete control to release the property to the lawful owner or to another entitled to possession without a court order; the district attorney's failure to designate the property as needed evidence or act in any way to deny release of the proceeds, established conclusively that the district attorney permitted release of the proceeds to the Department of Revenue under subsection (a). State v. Bonds, 120 N.C. App. 546, 463 S.E.2d 298 (1995).

Quoted in State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

Cited in United States v. Alston, 717 F. Supp. 378 (M.D.N.C. 1989); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

OPINIONS OF ATTORNEY GENERAL

If money or property is not seized as evidence of a controlled substance law violation, agents of the Department of Revenue may seize it for satisfaction of controlled substance excise taxes without an order from the court having jurisdiction over the criminal offense and without the district attorney's consent provided the seizure otherwise is made in compliance with law. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

In the absence of a pre-existing valid court order directing that property seized pursuant to a search warrant or other lawful authority be retained by the court or delivered to another court, a law enforcement agency in possession of the property is not required to obtain a court order prior to releasing it. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

§ 15-12. Publication of notice of unclaimed property; advertisement and sale of unclaimed bicycles.

Local Modification. — Alamance: 1995 (Reg. Sess., 1996), c. 618, ss. 1, 2; Craven: 1995 (Reg. Sess., 1996), c. 569, s. 2; city of Asheville: 1993 (Reg. Sess., 1994), c. 650; city of Havelock: 1995 (Reg. Sess., 1996), c. 569, s. 1; city of Hendersonville: 1995, c. 106, s. 1; city of New Bern: 1995 (Reg. Sess., 1996), c. 569, s. 1; town of Mooresville: 1995 (Reg. Sess., 1996), c. 614, s. 1.

For additional local modifications to this section, see the main pamphlet.

§ 15-13. Public sale 30 days after publication of notice.

If said articles shall remain unclaimed or satisfactory evidence of ownership thereof not be presented to the sheriff or police department, as the case may be, for a period of 30 days after the publication of the notice provided for in G.S. 15-12, then the said sheriff or police department in whose custody such articles may be is hereby authorized and empowered to sell the same at public auction for cash to the highest bidder, either at the courthouse door of the county, the county law enforcement headquarters if the sale is conducted by the sheriff, or at the police headquarters of the municipality in which the said articles of property are located, and at such sale to deliver the same to the purchaser or purchasers thereof. (1939, c. 195, s. 3; 1973, c. 1141, s. 5; 1991, c. 531, s. 2.)

Local Modification. — City of Winston-Salem: 1995 (Reg. Sess., 1996), c. 637, s. 1.

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law.

Editor's Note. — The citation in subsection (e) of this section to G.S. 69-1 should be changed to G.S. 58-79-1.

Legal Periodicals. —

For note, "North Carolina Adopts the Inevitable Discovery Exception to the Exclusionary Rule: — State v. Garner," see 15 Campbell L. Rev. 305 (1993).

CASE NOTES

Basis for Probable Cause. —

Probable cause for an administration inspection warrant may be based on (1) specific evidence of an existing violation, or (2) a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. In order to meet the requirements of the second standard, an applicant for an inspection warrant must show that: (1) there exists a legally authorized inspection program which naturally included the property; (2) that the general administrative enforcement plan is based on reasonable legislative or administrative standards; and (3) that the administrative standards are being applied to the particular establishment on a neutral basis. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied and appeal dismissed, 313 N.C. 327, 329 S.E.2d 385 (1985).

Scope and Objects of Search Must Be Included, etc. —

A warrant authorizing inspection of all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials, and all other things is not overbroad. A warrant authorizing a general inspection of an industry naturally contemplates a comprehensive inspection since the location of possible violations is unknown. Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied and appeal dismissed, 313 N.C. 327, 329 S.E.2d 385 (1985).

ARTICLE 13.

Venue.

§ 15-129. In offenses on waters dividing counties.

CASE NOTES

Cited in State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984).

§ 15-131. Assault in this State, death in another.

CASE NOTES

Jurisdiction of County Grand Jury. — Under the law of determining jurisdiction as between states, jurisdiction lies in this State if any of the essential acts forming the crime take place in this State. This same rationale extends to jurisdiction of the county grand jury to indict. State v. Vines, 317 N.C. 242, 345 S.E.2d 169 (1986).

Article 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

N.C. Const., Art. I, § 23 and § 15A-924(a)(5) did not specifically repeal this section, nor did they repeal it by implication. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

This section does not prevail over the language of § 15-155. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Indictment in form prescribed, etc. —

An indictment which complies with the short form indictment authorized by this section is sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985), aff'd, 95 N.C. App. 572, 383 S.E.2d 224 (1989).

This section contains no requirement that the indictment specify the degree of murder sought. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

Short-form murder indictment which did not allege premeditation nor the elements of felony murder was held not defective. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Nor Defendant's County, etc. —

Omission of the county of defendant's residence from murder indictment did not make the indictment fatally defective, since the county of defendant's residence did not have to be proved. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Omission of the phrase "with force and arms" does not render a defendant's indictment for murder fatally defective. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Essentials Make No Distinction, etc. —

An indictment which meets the requirements of this section will support a plea of guilty to or a conviction of either first or second degree murder. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

A prosecutor is not required to determine, before the return of the indictment, whether he will ultimately prosecute a defendant for murder in the first or second degree. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

The State is not required at any time to elect a theory upon which it will proceed against defendant on a charge of first degree murder, and it is proper for the trial court to submit the issue of defendant's guilt of that charge to the jury on each of the theories of first degree murder supported by substantial evidence presented at trial; rather than have the jury render a general verdict if it finds defendant guilty of first degree murder, the better practice is for the trial court to have the jury specify the theory or theories upon which it finds first degree murder to have been established beyond a reasonable doubt. State v. Clark, 325 N.C. 677, 386 S.E.2d 191 (1989).

Effect of State's Election of Felony Murder Theory. — The State's election to try a homicide case, and the trial judge's submission of it to the jury, only on a felony murder theory did not in effect acquit defendant of murder on a theory of premeditation and deliberation and all of its lesser included homicide offenses. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989), holding that the jury should have been instructed on involuntary murder under the circumstances.

Offenses Which Indictment Will Support. —

The short-form indictment drawn in accordance with this section is sufficient to charge murder in the first degree under a theory of lying in wait, just as it is sufficient to charge murder in the first degree on the theory of felony murder or premeditation and deliberation. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

An indictment in the form prescribed by this section will support a verdict finding the defendant guilty of first-degree murder upon any of the theories set forth in § 14-17 or guilty of any lesser offense included within any of those theories. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Indictment Barred by Collateral Estoppel. — State's first indictment of defendant charging manslaughter of "a natureless living female fetus . . ." was dismissed for failure to allege a material element of manslaughter, (that is, that defendant did kill another living human being), and State did not appeal; therefore, collateral estoppel barred State's second indictment for manslaughter alleging defendant did "kill and slay a living human being . . .," which referred to the same victim and incident. State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

When Instruction on Lesser Included Homicides Is Required. — In a felony murder prosecution under an indictment in the form prescribed by this section, evidence that defendant did not commit the underlying felony requires an instruction upon whatever lesser included homicides the indictment and the evidence support. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

A defendant may always show by the evidence not only his innocence under the theory of prosecution chosen by the State, but also his possible guilt of some lesser offense. If this lesser offense is included in the crime charged in the indictment and if there is evidence to support it, defendant is entitled to have it submitted to the jury. These different theories of defense cannot be abrogated by the State's decision to prosecute, nor the trial court's decision to submit the case on only one prosecutorial theory, when under the indictment and the evidence adduced another is more favorable to defendant. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Felony Murder or Lying in Wait. — For all murder cases prosecuted under § 14-17, when there is a conflict in the evidence regarding whether defendant committed the underlying felony or was lying in wait, all lesser degrees of homicide charged in the indictment pursuant to this section and supported by the evidence must be submitted to the jury. State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

Trial court may not premise a second-degree murder instruction on the possibility that the jury will accept some of the State's evidence while rejecting other portions of the State's case. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Instruction on Second-Degree Murder Where Evidence Shows Lying in Wait. — The trial court may not give an instruction on second-degree murder when the State's evidence supports a jury finding of each element of lying in wait and when there is no conflict with respect to such evidence. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

When the evidence supports a finding that the murder was perpetrated by means of lying in wait and there is no conflict in the evidence, the trial court is not required to instruct the jury on second-degree murder. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Applied in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984); State v. Albert, 312 N.C. 567, 324 S.E.2d 233 (1985).

Cited in State v. Hinson, 310 N.C. 245, 311 S.E.2d 256 (1984); State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986); State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987); State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), cert. denied, — U.S. —, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995).

§ 15-144.1. Essentials of bill for rape.

CASE NOTES

Section Eliminates Requirement, etc. —

In enacting this section, the legislature eliminated the requirement that every element to be proven at trial must be alleged in the indictment. State v.

Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

When Indictment Under This Section Is Constitutional. — An indictment under this section is constitutional if it permits the defendant to prepare a defense and to be protected from subsequent prosecution for the same offense. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

A short form indictment is constitutionally sufficient to charge a defendant with first degree rape. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

One purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of conviction. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Allegation as to Age of Victim. — An allegation that the victim was "a female child eight (8) years old" sufficiently alleged that she was "a child under 12" and satisfied the requirement of subsection (b) of this section as it existed on June 6, 1983. State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986).

State's failure to set forth the marital status of the parties involved is not fatal to an indictment for rape. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Unnecessary Averments. —

The date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. This rule, however, may not be used to deprive a defendant of his defense. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Where the indictments for attempted rape fully complied with the requirements set forth in this section, the indictments were not insufficient merely because neither indictment alleged that the victims of the crimes were females. State v. Bell, 311 N.C. 131, 316 S.E.2d 611 (1984).

Sufficiency of Indictment Under This Section and § 15-144.2. — The short form indictments set out in this section and § 15-144.2 for first-degree rape and first-degree sexual offense provide adequate notice of the charges. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The provisions of this section do not prevail over § 15-155. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Construction with § 15-155 as to, etc. —

In accord with first paragraph in the main volume. See State v. Welch, 69 N.C. App. 668, 318 S.E.2d 4 (1984).

Bill of Particulars. — The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Election by State. — By unequivocally arraigning defendant on second-degree rape and by failing thereafter to give any notice whatsoever, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape as arguably supported by the short-form indictment, the state made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape. State v. Jones, 317 N.C. 487, 346 S.E.2d 657 (1986).

Election of Trial Court Not to Submit Lesser Included Offenses. — Although the trial court elected not to submit the lesser included offense of attempted second degree rape and the offense of assault on a female to the jury, defendant was not acquitted of those charges, where there was a mistrial because of a hung jury, and defendant had been indicted only on second degree rape. State v. Hatcher, 117 N.C. App. 78, 450 S.E.2d 19 (1994).

Indictment Upheld. — Indictment for second-degree rape, which met the criteria specified in this section for a proper indictment for rape, was sufficient to allow defendant to prepare a defense and to be protected from double jeopardy, and was thus not fatally defective. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

Rape indictment drawn in accordance with this section was sufficient enough to let defendant know that he was charged with the rape of his estranged wife and to allow him to prepare his defense. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Applied in State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984).

Stated in State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984).

Cited in State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986); State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

§ 15-144.2. Essentials of bill for sex offense.

CASE NOTES

Specification of Sexual Act Unnecessary. — An indictment drafted pursuant to subsection (b) of this section without specifying which sexual act was committed is sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such accusation. Should a defendant require additional information on the nature of the specific sexual act with which he stands charged, he may move for a bill of particulars. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

An indictment which charges first degree sexual offense in accordance with this section without specifying which sexual act was committed is sufficient to charge the crime of first degree sexual offense and to put defendant on notice of the accusation. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

For an indictment to be legally valid under this statute, it must contain only the following: the name of the accused, the date of the offense, the county in which the offense was allegedly committed, the averment "with force and arms," the allegation that the accused unlawfully, willfully and feloniously engaged in a sex offense with the victim by force and against the victim's will, and the victim's name. An indictment including such information is sufficient to charge first-degree sexual offense, second-degree sexual offense, attempt to commit a sexual offense or assault. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

But Defendant May Demand to Know Specific "Sexual Act" Charged. — When the State does not specify at the outset which "sexual act" was committed by a defendant, it can be required to do so before trial on the indictment is had. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

State Bound by Allegation of Specific Sexual Act. — While the State was not required to allege the specific nature of the sex act in the indictment, having chosen to do so, it is bound by its allegations. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Evidence Must Correspond to Allegations. — The evidence in a criminal prosecution must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, the defendant's conviction thereof cannot stand. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Sufficiency of Indictment Under § 15-144.1 and This Section. — The short form indictments set out in § 15-144.1 and this section for first-degree rape and first-degree sexual offense provide adequate notice of the charges. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Indictment Sufficient to Charge First-Degree Sexual Offense. — This statute provides that if the indictment contains the averment that the victim was under age 13, the indictment is sufficient to charge first-degree sexual offense and all lesser included offenses. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Indictment charging first degree sexual offense which used the words "by force and against the victim's will[.]" was sufficient. State v. Smith, 110 N.C. App. 119, 429 S.E.2d 425, aff'd, 335 N.C. 162, 435 S.E.2d 770 (1993).

Bill of Particulars. — A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

§ 15-153. Bill or warrant not quashed for informality.

CASE NOTES

I. General Consideration.
II. Form and Sufficiency of Indictments and Warrants.
  B. Use of Language of Statute.
III. Defects.
  B. Omissions and Errors.

I. GENERAL CONSIDERATION.

Two Theories Alleged in Single Count. — Where, in a single count of an indictment, the State alleged two factual underpinnings for, or factual theories of, conviction for a violation of § 14-230, it was not required that the State prove both; proof of only one factual theory was legally sufficient and at most placed the State at risk of failing to persuade the jury of defendant's guilt. State v. Birdsong, 325 N.C. 418, 384 S.E.2d 5 (1989).

Quoted in State v. Snyder, 343 N.C. 61, 468 S.E.2d 221 (1996).

II. FORM AND SUFFICIENCY OF INDICTMENTS AND WARRANTS.

B. Use of Language of Statute.

Where Warrant Avers Facts Constituting Every Element of Offense. —

In accord with the main volume. See State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

III. DEFECTS.

B. Omissions and Errors.

Foreman's Failure to Sign Bill. — The omission of a signature on one of the bills of indictment did not affect the substance of the bill where the other four bills were properly signed on the same day; therefore, the trial court did not err in amending the bill of indictment by adding the signature of the grand jury foreman. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

§ 15-155. Defects which do not vitiate.

CASE NOTES

I. General Consideration.
II. Time of Offense.

I. GENERAL CONSIDERATION.

One purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of conviction. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

The provisions of § 15-144.1 do not prevail over this section. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Charge in Warrant Different from That in Indictment. — Where an arrest warrant listed a different charge from that subsequently returned in the indictment did not require that the judge dismiss the latter. State v. Riggs, 100 N.C. App. 149, 394 S.E.2d 670 (1990).

Words "with force and arms", etc. —

Section 15-144 does not prevail over the language of this section, and the omission of the phrase "with force and arms" does not, therefore, render a defendant's indictment for murder fatally defective. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Incorrect Venue. — Even if trafficking indictment failed to name Wake County as a county in which the offense occurred, and venue was therefore technically incorrect in Wake County, the Superior Court of Wake County nevertheless had jurisdiction to try the offense, as under § 15A-631 the return of an indictment is a matter of venue, not jurisdiction. State v. Carter, 96 N.C. App. 611, 386 S.E.2d 620 (1989), cert. denied, 326 N.C. 365, 389 S.E.2d 817 (1990).

Applied in State v. Joyce, 97 N.C. App. 464, 389 S.E.2d 136 (1990); State v. Everett, 328 N.C. 72, 399 S.E.2d 305 (1991).

Stated in State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984).

Cited in State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986); State v. Booth, 92 N.C. App. 729, 376 S.E.2d 242 (1989); State v. Smith, 110 N.C. App. 119, 429 S.E.2d 425 (1993).

II. TIME OF OFFENSE.

Failure to Charge Any Date. —

When time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date on which the crime was committed. State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984).

Failure to accurately state the date or time an offense is alleged to have occurred does not invalidate a bill of indictment, nor does it justify reversal of a conviction obtained thereon. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

A judgment for burglary was not arrested because the indictment imperfectly referred to the hour of midnight as 12:00 a.m. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

A child's uncertainty as to the time or particular day when the offense charged was committed shall not be grounds for nonsuit where there is sufficient evidence that the defendant committed each essential act of the offense. State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987).

Variance Between Date on Indictment and Date Proved Not Prejudicial. — Where defendant's evidence showed that he did not participate in the crimes and, had this evidence been believed by the jury, would have entitled defendant to acquittal, the variance between the date listed on the indictment and the time of the offense as proved at trial was not prejudicial to defendant, and did not deprive him of an opportunity to present his defense. State v. Riggs, 100 N.C. App. 149, 394 S.E.2d 670 (1990).

Variance Between Time, etc. —

The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment. A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. State v. Price, 310 N.C. 596, 313 S.E.2d 556 (1984).

Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

As Where He Relies upon Alibi. —

Where a defendant relies upon a defense of alibi, time becomes essential. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

In cases of sexual assaults on children, temporal specificity requisites diminish. Thus, where the child victim testified that defendant perpetrated rape and other sexual offenses against her on several occasions over a period of six years, and specifically recalled offenses occurring on September 27 and September 29, 1988, for both of which dates the defendant presented an alibi, and where the difference between the testimony of the victim as to which offense occurred on which date did not prevent the defendant from presenting his alibi, there was no error in letting the case go to the jury. State v. Young, 103 N.C. App. 415, 406 S.E.2d 3, cert. denied, 330 N.C. 201, 412 S.E.2d 65 (1991).

Reversal of Dates, etc. —

The date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. This rule, however, may not be used to deprive a defendant of his defense. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Change of Date on Indictment Permitted. — In prosecution for incest, where although the testimony of the young prosecuting witness as to the date of the offense differed from that of her mother, all of the State's evidence showed that the crime, if committed, took place on the Sunday of the weekend during which a certain individual visited the defendant's residence, the change on the indictment of the date of the offense, as permitted by the trial court, did not substantially alter the charge against the defendant, nor did it unfairly surprise him or prevent him from presenting a defense. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

It was the fact that another felony was committed, not its specific date, which was the essential question in habitual felon indictment; therefore, because date alleged in indictment was neither an essential nor a substantial fact as to the charge of habitual felon, the trial court properly allowed the state to change the date in the habitual felon indictment. State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994).

Fatal Variance Not Shown. — There was no fatal variance between the allegations contained in the indictment and the actual proof presented by the State with regard to the date of the offense, where although the warrant and bill of indictment showed the date of the offense as March 13, 1985, the defendant was put on notice as to the child victim's uncertainty as to the date during a probable cause hearing, and where, additionally, the defendant did not in fact rely on the date stated in the indictment. State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986).

ARTICLE 15A.

Investigation of Offenses Involving Abandonment and Nonsupport of Children.

§ 15-155.1. Reports to district attorneys of aid to dependent children and illegitimate births.

The Department of Human Resources, by and through the Secretary of Human Resources, shall promptly after June 19, 1959, make a report to each district attorney, setting out the names and addresses of all mothers who reside in his prosecutorial district as defined in G.S. 7A-60 and are recipients of aid to dependent children under the provisions of Part 2, Article 2, Chapter 108A of the General Statutes. Such report shall in some manner show the identity of the unwed mothers and shall set forth the number of children born to each said mother. Such a report shall also be made monthly thereafter setting out the names and addresses of all such mothers who reside in the district and who may have become recipients of aid to dependent children since the date of the last report. (1959, c. 1210, s. 1; 1973, c. 47, s. 2; c. 476, s. 138; 1987 (Reg. Sess., 1988), c. 1037, s. 50.)

§ 15-155.2. District attorney to take action on report of aid to dependent child or illegitimate birth.

(a) Upon receipt of such reports as are provided for in G.S. 15-155.1, the district attorney of superior court may make an investigation to determine whether the mother of an illegitimate child or who is a recipient of aid to a dependent child or children, has abandoned, is willfully neglecting or is refusing to support and maintain the child within the meaning of G.S. 14-326 or 49-2 or is diverting any part of the funds received as aid to a dependent child to any purpose other than for the support and maintenance of such dependent child in violation of G.S. 108-76.1. In making this investigation the district attorney is authorized to call upon:

(1) Any county board of social services or the Department of Human Resources for personal, clerical or investigative assistance and for access to any records kept by either such board and relating to the matter under investigation and such boards are hereby directed to assist in all investigations hereunder and to furnish all records relating thereto when so requested by the district attorney;

(2) The board of county commissioners of any county within his district for legal or clerical assistance in making any investigation or investigations in such county and such boards are hereby authorized to furnish such assistance in their discretion; and

(3) The district attorney of any inferior court in his district for personal assistance in making any investigation or investigations in the county in which the court is located and any district attorney so called upon is hereby authorized to furnish such assistance by and with the consent of the board of county commissioners of the county in which the court is located, which board shall provide and fix his compensation for assistance furnished.

(b) If following the investigation the district attorney has reasonable grounds to believe that a violation of G.S. 49-2, 14-326, 108-76.1 or any other criminal offense is being or has been committed, he shall send to the grand jury of the county in which he believes the offense is being or has been committed a bill of indictment charging the commission of the offense. Sole and exclusive jurisdiction of offenses discovered as a result of investigations under this section shall be vested in the superior court notwithstanding any other provisions of law, whether general, special or local. Provided nothing in this Article shall be construed to take from the inferior courts any authority or responsibility now vested in them by existing law or to compel the district attorney to again prosecute a crime that has been disposed of in the inferior courts.

(c) Repealed by Session Laws 1985, c. 589, s. 8, effective January 1, 1986. (1959, c. 1210, s. 1; 1969, c. 982; 1973, c. 47, s. 2; c. 476, s. 138; 1985, c. 589, s. 8.)

Editor's Note. — Session Laws 1985, c. 589, which repealed subsection (c), provided in s. 64 that prosecutions for offenses occurring before the effective date of the act (Jan. 1, 1986) would not be abated or affected by the act, and that the statutes that would be applicable but for the act remained applicable to those prosecutions, and provided in s. 66 that rules to implement the act which were authorized to be adopted by the act or which were otherwise authorized to be adopted by law could be adopted at any time after ratification (July 4, 1985), but would not become effective before January 1, 1986.

Session Laws 1985, c. 589, s. 65 is a severability clause.

Section 14-326, referred to in subsections (a) and (b) of this section, was repealed by Session Laws 1981, c. 683, s. 3. The subject matter of former § 14-326 is covered in § 14-322.

Section 108-76.1, referred to in subsections (a) and (b) of this section, was not retained in the 1969 revision of Chapter 108.

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

ARTICLE 17.

Trial in Superior Court.

§ 15-166. Exclusion of bystanders in trial for rape and sex offenses.

CASE NOTES

The trial court erred in granting the State's motion to clear the courtroom during the victim's testimony because it did not determine if the party seeking closure had advanced an overriding interest that was likely to be prejudiced, ordered closure no broader than necessary to protect that interest, considered reasonable alternatives to closing the procedure, and made findings adequate to support the closure. State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622, stay granted pending appeal, 336 N.C. 784, 447 S.E.2d 435, cert. denied, temporary stay dissolved, 337 N.C. 804, 449 S.E.2d 752 (1994).

Cited in In re Stradford, 119 N.C. App. 654, 460 S.E.2d 173 (1995).

§ 15-167. Extension of session of court by trial judge.

CASE NOTES

Cited in State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994); Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289, rehearing denied, 337 N.C. 807, 449 S.E.2d 566 (1994).

§ 15-169. Conviction of assault, when included in charge.

CASE NOTES

What Indictment Includes — Murder. —

A bill of indictment charging that defendant "unlawfully, willfully, and feloniously and of malice aforethought did kill and murder the victim" is insufficient to support a verdict of guilty of assault, assault inflicting serious injury or assault with intent to kill. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

§ 15-170. Conviction for a less degree or an attempt.

Legal Periodicals. —

For comment on the defense of legal impossibility in light of State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982), see 19 Wake Forest L. Rev. 605 (1983).

For note, "Looking at Lesser Included Offenses on an 'All or Nothing' Basis: State v. Bullard and the Sporting Approach to Criminal Justice," see 69 N.C.L. Rev. 1470 (1991).

CASE NOTES

I. General Consideration.
II. Jury Instructions.
III. Lesser and Included Offenses.

I. GENERAL CONSIDERATION.

Conviction on lesser offense renders any error in submission of greater offense harmless. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Offense Not Included If It Contains Element Not in Other Crime. — A crime is not a lesser included offense of another crime if the former contains any element that the latter does not. State v. Peoples, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Effect of State's Election of Felony Murder Theory. — The State's election to try a homicide case, and the trial judge's submission of it to the jury, only on a felony murder theory did not in effect acquit defendant of murder on a theory of premeditation and deliberation and all of its lesser included homicide offenses. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989), holding that the jury should have been instructed on involuntary murder under the circumstances.

A defendant may always show by the evidence not only his innocence under the theory of prosecution chosen by the State, but also his possible guilt of some lesser offense. If this lesser offense is included in the crime charged in the indictment and if there is evidence to support it, defendant is entitled to have it submitted to the jury. These different theories of defense cannot be abrogated by the State's decision to prosecute, nor the trial court's decision to submit the case on only one prosecutorial theory, when under the indictment and the evidence adduced another is more favorable to defendant. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Applied in State v. Robinson, 310 N.C. 530, 313 S.E.2d 571 (1984).

Quoted in State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

Stated in Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993).

Cited in State v. Bullard, 82 N.C. App. 718, 347 S.E.2d 874 (1986); State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993); State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

II. JURY INSTRUCTIONS.

But Evidence Must Support, etc. — In accord with second paragraph in the main volume. See State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989).

Necessity for Instructing Jury, etc. —

In a proper case where it is permissible under the indictment to convict defendant of a lesser included offense, the court must still determine that there is evidence tending to support the lesser offense in order to submit it for the jury's consideration. Upon a favorable determination of both issues, that is, that the crime is a lesser included offense and that there is evidence to support it, defendant is entitled to have the instruction on the lesser offense submitted to the jury. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

When Instruction on Lesser Included Homicides Required. — In a felony murder prosecution under an indictment in the form prescribed by § 15-144, evidence that defendant did not commit the underlying felony requires an instruction upon whatever lesser included homicides the indictment and the evidence support. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Where a defendant's sole defense is one of alibi, he is not entitled to have the jury consider a lesser offense on the theory that jurors may take bits and pieces of the State's evidence and bits and pieces of defendant's evidence and thus find him guilty of a lesser offense not positively supported by the evidence. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Defendant Not Entitled to Instruction. — Defendant's testimony was that he knew nothing of any of the controlled substances found in the house, there was no basis on which a jury could find that a lesser offense was committed, and at trial the defendant denied knowledge of all of the controlled substances, not just those not in "plain view;" therefore, the trial court did not err in refusing to instruct the jury on a lesser included offense of felonious possession of heroin. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

III. LESSER AND INCLUDED OFFENSES.

An indictment charging a completed offense is sufficient to support a conviction for attempt to commit the crime charged. This statute applies even though the completed crime and the attempt are not in the same statute. State v. Slade, 81 N.C. App. 303, 343 S.E.2d 571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986).

Indictment charging defendant with the completed offense of giving a controlled substance to an inmate was sufficient to enable him to adequately prepare for trial and to protect him from being twice put in jeopardy for the same offense, so as to support his conviction of attempt to give a controlled substance to an inmate. State v. Slade, 81 N.C. App. 303, 343 S.E.2d 571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986).

Larceny Pursuant to Breaking or Entering. — While it is error for the court to permit the jury to convict based on some abstract theory not supported by the bill of indictment, an indictment charging defendant with larceny pursuant to a burglary was sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering, as felonious breaking or entering is a lesser degree of the offense of second degree burglary, and this section provides that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Felony Murder While Discharging Firearm into Occupied Building. — In felony murder trial for murder committed during the act of discharging a firearm into an occupied building, a felony under § 14-34.1, where defendant's sole and unequivocal defense was that he was nowhere near the area on the night in question, an instruction on the offense of involuntary manslaughter was not warranted by the evidence. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

§ 15-172. Verdict for murder in first or second degree.

CASE NOTES

Cited in State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

§ 15-173. Demurrer to the evidence.

CASE NOTES

I. General Consideration.
II. Other Motions Compared.
III. Question Presented by Motion.
IV. Allowance of Motion.
V. Denial of Motion.
    B. Appeal from Denial of Motion.
VI. Evidence.
VII. Introduction of Testimony by Defendant at Trial.

I. GENERAL CONSIDERATION.

Necessity of Moving for Judgment or Dismissal at Trial. — Although § 15A-1446(d)(5) allows a defendant to appeal on insufficiency of evidence grounds, notwithstanding the fact that no objection, exception or motion was made at trial, this statute is negated by N.C.R.A.P., Rule 10(b)(3), which states that a defendant may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action or for judgment as in case of nonsuit at trial. State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

A motion to dismiss under § 15A-1227 is substantively identical to a motion for nonsuit under this section. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Applied in State v. Elliott, 69 N.C. App. 89, 316 S.E.2d 632 (1984); State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984); State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984); State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984); State v. Wilson, 73 N.C. App. 398, 326 S.E.2d 360 (1985); State v. Blankenship, 89 N.C. App. 465, 366 S.E.2d 509 (1988); State v. Woodard, 324 N.C. 227, 376 S.E.2d 753 (1989); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989); State v. Ray, 97 N.C. App. 621, 389 S.E.2d 422 (1990).

Cited in State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Nelson, 69 N.C. App. 455, 317 S.E.2d 70 (1984); State v. Ausley, 78 N.C. App. 791, 338 S.E.2d 547 (1986); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988); State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988); In re Lucas, 94 N.C. App. 442, 380 S.E.2d 563 (1989); State v. Franklin, 327 N.C. 162, 393 S.E.2d 781 (1990).

II. OTHER MOTIONS COMPARED.

Motion to dismiss under § 15A-1227(a)(1) for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under this section. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985); State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987); State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987).

III. QUESTION PRESENTED BY MOTION.

Question Presented. —
In accord with ninth paragraph in the main volume. See State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

When a defendant moves under § 15A-1227(a)(2) or under this section for dismissal at the close of all of the evidence, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

IV. ALLOWANCE OF MOTION.

Where complete defense is established by State's case, etc. —
When the State's evidence presents a complete defense, a defendant's motion for nonsuit should be allowed. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

V. DENIAL OF MOTION.

B. Appeal from Denial of Motion.

Question on Appeal Where Defendant Offers Evidence. —
The denial of defendant's motion to dismiss at the close of the State's evidence was not properly at issue on appeal, where defendant chose to offer evidence after his motion was denied and thereby waived appellate review of the trial judge's decision. State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987).

Under this section, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as grounds for appeal. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

Where defendant chose to offer evidence after his motion to dismiss was denied, he thereby waived appellate review of the trial judge's decision. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Consideration of Entire Evidence, etc. —
Defendant's exception to the denial of his motion to dismiss, made at the close of all of the evidence, presented the issue of the sufficiency of all of the evidence to go to the jury. Therefore, for purposes of reviewing this assignment of error, the court would consider all of the evidence introduced at trial, and would not determine whether that evidence was competent. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

VI. EVIDENCE.

Need Not Exclude Every Reasonable Hypothesis, etc. —
In accord with the main volume. See State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State, as well as that introduced by defendant. State v. Perry, 316 N.C. 87, 340 S.E.2d 450 (1986).

Renewal of the motion to dismiss at the conclusion of all the evidence compels the court to consider the motion in light of all the evidence presented at trial. State v. Britt, 87 N.C. App. 152, 360 S.E.2d 291 (1987), cert. denied, 321 N.C. 475, 364 S.E.2d 924 (1988).

Evidence Considered in Light Most Favorable to State. —

In accord with first paragraph in the main volume. See State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

In accord with sixth paragraph in the main volume. See State v. Dow, 70 N.C. App. 82, 318 S.E.2d 883 (1984).

Upon defendant's motion to dismiss, all the evidence favorable to the State must be considered, such evidence must be deemed true and considered in the light most favorable to the State, and the State is entitled to every inference of fact which may be reasonably deduced therefrom. State v. Stanley, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985).

When defendant moves under § 15A-1227(a)(2) or under this section for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give the state all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Defendant's Evidence May Be Considered. — In considering a motion to dismiss made at the close of all the evidence, the defendant's evidence as well as the State's evidence may be considered. State v. Davis, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

In reviewing a motion to dismiss at the conclusion of all the evidence, the court must consider any evidence presented by defendant which rebuts the inference of guilt, so long as it is not contradicted by any of the State's evidence. State v. Britt, 87 N.C. App. 152, 360 S.E.2d 291 (1987), cert. denied, 321 N.C. 475, 364 S.E.2d 924 (1988).

Contradictions and Discrepancies in Evidence Are for Jury, etc. —

In accord with first paragraph in the main volume. See State v. Dow, 70 N.C. App. 82, 318 S.E.2d 883 (1984).

Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

VII. INTRODUCTION OF TESTIMONY BY DEFENDANT AT TRIAL.

Effect of Defendant Introducing Testimony, etc. —

In accord with first paragraph in the main volume. See State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

In accord with second paragraph in the main volume. See State v. Lilley, 78 N.C. App. 100, 337 S.E.2d 89 (1985), aff'd, 318 N.C. 400, 348 S.E.2d 789 (1986); State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985); State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987); State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987).

In accord with third paragraph in the main volume. See State v. Davis, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

Waiver of Motion. —

Where defendant introduced evidence at trial on his own behalf, he waived his right to complain on appeal of the denial of his initial motion to dismiss at the conclusion of the State's evidence. Accordingly, only the sufficiency of the evidence at the close of all of the evidence was before the court on appeal. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988).

Under this section, a defendant who introduces evidence waives any motion for dismissal or nonsuit made prior to the introduction of his evidence and cannot urge the prior motion as ground for appeal. State v. Degree, 322 N.C. 302, 367 S.E.2d 679 (1988).

§ 15-176. Prisoner not to be tried in prison uniform.

It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

Any sheriff, jailer or other officer who violates the provisions of this section shall be guilty of a Class 1 misdemeanor. (1915, c. 124; C.S., s. 4646; 1993, c. 539, s. 296; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 296, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 17A.

Informing Jury in Case Involving Death Penalty.

§ 15-176.5. Argument to jury on consequences of guilty verdict.

CASE NOTES

Trial court erred when it instructed jury that defendant's argument discussing punishment should be disregarded. This was a violation of defendant's statutory rights under this section and § 84-14. State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995).

ARTICLE 19.

Execution.

§ 15-190. Person or persons to be designated by warden to execute sentence; supervision of execution; who shall be present.

CASE NOTES

Audiotape or Videotape of Execution Not Allowed. — Plaintiffs (prisoner and television talk-show host) did not have a right under either the First or Fourteenth Amendments to the United States Constitution or under Art. I, § 14 of the North Carolina Constitution to audiotape or videotape prisoner/plaintiff's scheduled execution. Under this section the execution was under the supervision and control of the warden and, as a matter of law, neither the Secretary of the North Carolina Department of Correction nor the warden could be mandamused to permit the requested audiotaping or videotaping. Lawson v. Dixon, 336 N.C. 312, 446 S.E.2d 799 (1994).

§ 15-194. Time for execution.

In sentencing a capital defendant to a death sentence pursuant to G.S. 15A-2000(b), the sentencing judge need not specify the date and time the execution is to be carried out by the Department of Correction. The warden of the State penitentiary at Raleigh shall immediately schedule a date for the execution of the original death sentence not less than 30 days nor more than 45 days from the date of receiving notification of any one of the following:

(1) The United States Supreme Court has filed an opinion upholding the sentence of death following completion of the initial State and federal postconviction proceedings, if any;

(2) The mandate issued by the Supreme Court of North Carolina on direct appeal pursuant to N.C.R. App. P. 32(b) affirming the capital defendant's death sentence and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;

(3) The capital defendant, if indigent, failed to timely seek the appointment of counsel pursuant to G.S. 7A-451(c), or failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a);

(4) The superior court denied the capital defendant's motion for appropriate relief, but the capital defendant failed to file a timely petition for writ of certiorari to the Supreme Court of North Carolina pursuant to N.C.R. App. P. 21(f);

(5) The Supreme Court of North Carolina denied the capital defendant's petition for writ of certiorari pursuant to N.C.R. App. P. 21(f), or, if certiorari was granted, upheld the capital defendant's death sentence, but the capital defendant failed to file a timely petition for writ of certiorari to the United States Supreme Court; or

(6) Following State postconviction proceedings, if any, the capital defendant failed to file a timely petition for writ of habeas corpus in the appropriate federal district court, or failed to timely appeal or petition an adverse habeas corpus decision to the United States Court of Appeals for the Fourth Circuit or the United States Supreme Court.

The warden shall send a certified copy of the document fixing the date to the clerk of superior court of the county in which the case was tried or, if venue was changed, in which the defendant was indicted. The certified copy shall be recorded in the minutes of the court. The warden shall also send certified copies to the capital defendant, the capital defendant's attorney, the district attorney who prosecuted the case, and the Attorney General of North Carolina. (1909, c. 443, s. 6; C.S., s. 4663; 1925, c. 55; 1951, c. 244, ss. 1, 2; 1973, c. 47, s. 2; 1981, c. 900; 1995 (Reg. Sess., 1996), c. 719, s. 5.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, rewrote this section.

CASE NOTES

Cited in State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984); North Carolina Council of Churches v. State, 120 N.C. App. 84, 461 S.E.2d 354 (1995).

§ 15-196: Repealed by Session Laws 1989, c. 353, s. 3, effective October 1, 1989.

Editor's Note. — Session Laws 1989, c. 353, s. 4 made the repeal of this section effective October 1, 1989, and applicable to deaths occurring on or after that date.

ARTICLE 19A.

Credits against the Service of Sentences and for Attainment of Prison Privileges.

§ 15-196.1. Credits allowed.

CASE NOTES

But a defendant who has served, pursuant to special probation, an active sentence is entitled to credit for that time on any sentence imposed upon revocation of probation. State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803, aff'd, 336 N.C. 552, 444 S.E.2d 182 (1994).

§ 15-196.2. Allowance in cases of multiple sentences.

CASE NOTES

Where two life sentences which were imposed on defendant were to run concurrently, defendant should have been credited on both life sentences with time spent in jail awaiting trial. State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987).

Applied in State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

§ 15-196.3. Effect of credit.

CASE NOTES

Reduction of Original Sentence Not A Credit. — The fact that a judge reduced defendant's original seven year sentence to six years and nine months, a total reduction of 90 days, did not satisfy the requirement that the defendant be given a 90-day credit. A credit reduces the time required to attain privileges which are dependent upon the passage of a specific length of time in custody, and a reduction in the sentence term did not accomplish that purpose. State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803, aff'd, 336 N.C. 552, 444 S.E.2d 182 (1994).

ARTICLE 20.

Suspension of Sentence and Probation.

§ 15-205. Duties and powers of the probation officers.

CASE NOTES

This section refers only to the power to investigate on behalf of the court the advisability of placing the defendant on probation. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

No Authority to Order DAPP to Supervise Defendant. — Superior court had no authority to enter order requiring Division of Adult Probation and Parole, without its consent, to provide supervision of defendant who had been determined incompetent to stand trial but not subject to involuntary commitment, while in custody of his former wife. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

§ 15-207. Records treated as privileged information.

CASE NOTES

Section Requires Court Order, Not Discovery Motion. — Where defendant requested, in motion for discovery, records, files, information or knowledge in the possession of the State, trial court did not err in its refusal to allow defendant access to his parole records; this section requires a court order to obtain probation records to protect their confidentiality and defense counsel did not follow this procedure; therefore, defendant's discovery motion was not applicable to defendant's probation records. State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989).

ARTICLE 22.

Review of Criminal Trials.

§ 15-217.1: Recodified as § 15A-1420(b1) by Session Laws 1995 (Regular Session, 1996), c. 719, s. 3.

ARTICLE 23.

Expunction of Records.

§§ 15-223, 15-224: Recodified as §§ 15A-145 and 15A-146 by Session Laws 1985, c. 636, s. 1, effective July 5, 1985.

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER I. GENERAL.

Article 3.

Venue.

Sec.

15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county.

Article 5.

Expunction of Records.

15A-146. Expunction of records when charges are dismissed or there are findings of not guilty.

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

Article 12.

Pen Registers; Trap and Trace Devices.

15A-261. Prohibition and exceptions.

Article 13.

DNA Database and Databank.

15A-266. Short title.
15A-266.1. Policy.
15A-266.2. Definitions.
15A-266.3. Procedural compatibility with the FBI.
15A-266.4. Blood sample required for DNA analysis upon conviction.
15A-266.5. Tests to be performed on blood sample.
15A-266.6. Procedures for withdrawal of blood sample for DNA analysis.
15A-266.7. Procedures for conducting DNA analysis of blood sample.
15A-266.8. DNA database exchange.
15A-266.9. Cancellation of authority to exchange DNA records.
15A-266.10. Expungement.
15A-266.11. Unauthorized uses of DNA Databank; penalties.
15A-266.12. Confidentiality of records.
15A-267 through 15A-270. [Reserved.]

Article 16.

Electronic Surveillance.

Sec.

15A-286. Definitions.
15A-287. Interception and disclosure of wire, oral, or electronic communications prohibited.
15A-288. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited.
15A-289. Confiscation of wire, oral, or electronic communication interception devices.
15A-290. Offenses for which orders for electronic surveillance may be granted.
15A-291. Application for electronic surveillance order; judicial review panel.
15A-292. Request for application for electronic surveillance order.
15A-293. Issuance of order for electronic surveillance; procedures for implementation.
15A-294. Authorization for disclosure and use of intercepted wire, oral, or electronic communications.
15A-295. Reports concerning intercepted wire, oral, or electronic communications.
15A-296. Recovery of civil damages authorized.
15A-297. Conformity to provisions of federal law.
15A-298. Subpoena authority.
15A-299, 15A-300. [Reserved.]

SUBCHAPTER III. CRIMINAL PROCESS.

Article 17.

Criminal Process.

15A-301. Criminal process generally.
15A-302. Citation.

Article 18.

15A-306 through 15A-353. [Reserved.]

SUBCHAPTER IV. ARREST.

Article 20.

Arrest.

Sec.

15A-401. Arrest by law-enforcement officer.

15A-402. Territorial jurisdiction of officers to make arrests.

15A-405. Assistance to law-enforcement officers by private persons to effect arrest or prevent escape; benefits for private persons.

15A-406. Assistance by federal officers.

15A-407 through 15A-409. [Reserved.]

Article 21.

15A-410 through 15A-453. [Reserved.]

SUBCHAPTER V. CUSTODY.

Article 23.

Police Processing and Duties upon Arrest.

15A-502. Photographs and fingerprints.

15A-505. Notification of minor's parent.

Article 26.

Bail.

15A-531. Definitions.

15A-532. Persons authorized to determine conditions for release; use of two-way audio and video transmission.

15A-534. Procedure for determining conditions of pretrial release.

15A-534.1. Crimes of domestic violence; bail and pretrial release.

15A-534.3. Detention for communicable diseases.

15A-534.4. Sex offenses and crimes of violence against child victims: bail and pretrial release.

15A-540. Surrender of a principal by a surety; setting new conditions of release.

15A-541. Persons prohibited from becoming surety.

15A-542. False qualification by surety.

15A-543. Penalties for failure to appear.

15A-544. Forfeiture.

15A-547.1. Remit bail bond if defendant sentenced to community or intermediate punishment.

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

Article 29.

First Appearance before District Court Judge.

Sec.

15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court; use of two-way audio and video transmission.

Article 30.

Probable-Cause Hearing.

15A-615. Testing of certain persons for sexually transmitted infections.

15A-616 through 15A-620. [Reserved.]

Article 31.

The Grand Jury and Its Proceedings.

15A-622. Formation and organization of grand juries; other preliminary matters.

15A-623. Grand jury proceedings and operation in general.

15A-644.1. Filing of information when plea of guilty or no contest in district court to Class H or I felony.

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

Article 35.

Speedy Trial.

15A-701 through 15A-710. [Repealed.]

Article 36.

Special Criminal Process for Attendance of Defendants.

15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.

Article 37.

Uniform Criminal Extradition Act.

Sec.
15A-731. Penalty for noncompliance with § 15A-730.
15A-743. Application for issuance of requisition; by whom made; contents.

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

Article 45.

Fair Treatment for Victims and Witnesses.

15A-824. Definitions.
15A-825. Treatment due victims and witnesses.

SUBCHAPTER IX. PRETRIAL PROCEDURE.

Article 49.

Pleadings and Joinder.

15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

Article 50.

Voluntary Dismissal.

15A-931. Voluntary dismissal of criminal charges by the State.
15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement.

Article 51.

Arraignment.

15A-941. Arraignment before judge only upon written request; use of two-way audio and video transmission; entry of not guilty plea if not arraigned.
15A-942. Right to counsel.

Article 52.

Motions Practice.

15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

Article 56.

Incapacity to Proceed.

Sec.
15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

Article 57.

Pleas.

15A-1011. Pleas in district and superior courts; waiver of appearance.

Article 58.

Procedures Relating to Guilty Pleas in Superior Court.

15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.
15A-1027. Limitation on collateral attack on conviction.
15A-1028 through 15A-1029. [Reserved.]
15A-1029.1. Transfer of case from superior court to district court to accept guilty and no contest pleas for certain felony offenses.
15A-1030. [Reserved.]

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

Article 73.

Criminal Jury Trial in Superior Court.

15A-1221. Order of proceedings in jury trial; reading of indictment prohibited.
15A-1228. Notes by the jury.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Article 78.

Order of Commitment to Imprisonment.

15A-1301. Order of commitment to imprisonment when not otherwise specified.

Article 80.

Defendants Found Not Guilty by Reason of Insanity.

Sec.
15A-1321. Automatic civil commitment of defendants found not guilty by reason of insanity.

Article 81.

General Sentencing Provisions.

15A-1331. Authorized sentences; conviction.
15A-1331A. Forfeiture of licensing privileges after conviction of a felony.
15A-1332. Presentence reports.

Article 81A.

Sentencing Persons Convicted of Felonies.

15A-1340.1 through 15A-1340.7. [Repealed.]
15A-1340.8, 15A-1340.9. [Reserved.]

Article 81B.

Structured Sentencing of Persons Convicted of Crimes.

Part 1. General Provisions.

15A-1340.10. Applicability of structured sentencing.
15A-1340.11. Definitions.
15A-1340.12. Purposes of sentencing.

Part 2. Felony Sentencing.

15A-1340.13. Procedure and incidents of sentence of imprisonment for felonies.
15A-1340.14. Prior record level for felony sentencing.
15A-1340.15. Multiple convictions.
15A-1340.16. Aggravated and mitigated sentences.
15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm during the commission of the felony.
15A-1340.17. Punishment limits for each class of offense and prior record level.
15A-1340.18, 15A-1340.19. [Reserved.]

Part 3. Misdemeanor Sentencing.

15A-1340.20. Procedure and incidents of sentence of imprisonment for misdemeanors.
Sec.
15A-1340.21. Prior conviction level for misdemeanor sentencing.
15A-1340.22. Multiple convictions.
15A-1340.23. Punishment limits for each class of offense and prior conviction level.

Article 82.

Probation.

15A-1341. Probation generally.
15A-1342. Incidents of probation.
15A-1343. Conditions of probation.
15A-1343.1. Criteria for selection and sentencing to IMPACT.
15A-1343.2. Special probation rules for persons sentenced under Article 81B.
15A-1344. Response to violations; alteration and revocation.
15A-1344.1. Procedure to insure payment of child support.

Article 83.

Imprisonment.

15A-1351. Sentence of imprisonment; incidents; special probation.
15A-1352. Commitment to Department of Correction or local confinement facility.
15A-1354. Concurrent and consecutive terms of imprisonment.
15A-1355. Calculation of terms of imprisonment.

Article 84.

Fines.

15A-1366, 15A-1367. [Reserved.]

Article 84A.

Post-Release Supervision.

15A-1368. Definitions and administration.
15A-1368.1. Applicability of Article 84A.
15A-1368.2. Post-release supervision eligibility and procedure.
15A-1368.3. Incidents of post-release supervision.
15A-1368.4. Conditions of post-release supervision.
15A-1368.5. Commencement of post-release supervision; multiple sentences.
15A-1368.6. Arrest and hearing on post-release supervision violation.
15A-1369, 15A-1370. [Reserved.]

Article 85.

Parole.

Sec.
15A-1370.1. Applicability of Article 85.
15A-1371. Parole eligibility, consideration, and refusal.
15A-1372. Length and effect of parole term.
15A-1373. Incidents of parole.
15A-1374. Conditions of parole.
15A-1376. Arrest and hearing on parole violation.

Article 85A.

Parole of Certain Convicted Felons.

15A-1380.1, 15A-1380.2. [Repealed.]
15A-1380.3, 15A-1380.4. [Reserved.]

Article 85B.

Review of Sentences of Life Imprisonment Without Parole.

15A-1380.5. Review of sentences of life imprisonment without parole.

Article 86.

Reports of Dispositions of Criminal Cases.

15A-1381. Disposition defined.
15A-1383. Plans for implementation of Article; punishment for failure to comply; modification of plan.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

Article 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

Sec.
15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.
15A-1419. When motion for appropriate relief denied.
15A-1420. Motion for appropriate relief; procedure.

Article 90.

Appeals from Magistrates and District Court Judges.

15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.

Article 91.

Appeal to Appellate Division.

15A-1441. Correction of errors by appellate division.
15A-1442. Grounds for correction of error by appellate division.
15A-1444. When defendant may appeal; certiorari.
15A-1445. Appeal by the State.
15A-1448. Procedures for taking appeal.

SUBCHAPTER XV. CAPITAL PUNISHMENT.

Article 100.

Capital Punishment.

15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
15A-2002. Capital offenses; jury verdict and sentence.

Editor's Note. — Chapter 24, section 14 of the North Carolina Extra Session, amended the effective date provisions of Chapter 538, section 56 and Chapter 539, section 1359 of the 1993 Session Laws by changing the effective date of the changes made by those chapters from January 1, 1995 to October 1, 1994. Several sections in this chapter have been affected by this change.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

CASE NOTES

Applied in State v. Maye, 104 N.C. App. 437, 410 S.E.2d 8 (1991); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994).

Cited in State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988); State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990); State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993); State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

ARTICLE 3.

Venue.

§ 15A-131. Venue generally.

CASE NOTES

As to findings of facts and the totality of the circumstances justifying trial judge's transfer of venue in a sexual offense case involving children, see State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

§ 15A-132. Concurrent venue.

CASE NOTES

Cited in State v. Carter, 96 N.C. App. 611, 386 S.E.2d 620 (1989).

§ 15A-133. Waiver of venue; motion for change of venue; indictment may be returned in other county.

(a) A waiver of venue must be in writing and signed by the defendant and the prosecutor indicating the consent of all parties to the waiver. The waiver must specify what stages of the proceedings are affected by the waiver, and the county to which venue is changed. If the venue is to be laid in a county in another prosecutorial district, the consent in writing of the prosecutor in that district must be filed with the clerks of both counties.

(b) Repealed by Session Laws 1989, c. 688, s. 2, effective October 1, 1989.

(c) Motions for change of venue by the defendant are made under G.S. 15A-957. If venue is laid in a county in another prosecutorial district by order of the judge ruling on the motion, no consent of any prosecutor is required.

(d) If venue is changed to a county in another prosecutorial district, whether upon waiver of venue or by order of a judge, the prosecutor of the prosecutorial district where the case originated must prosecute the case unless the prosecutor of the district to which venue has been changed consents to conduct the prosecution.

(e) If venue is changed, whether upon waiver of venue or by order of a judge, the grand jury in the county to which venue has been transferred has the power to return an indictment in the case. If an indictment has already been returned before the change of venue, no new indictment is necessary and prosecution may be had in the new county under the original indictment. (1921, c. 12, ss. 1, 2; C.S., ss. 4606(a), 4606(b); 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1987 (Reg. Sess., 1988), c. 1037, s. 54; 1989, c. 688, s. 2.)

ARTICLE 5.

Expunction of Records.

§ 15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.

OPINIONS OF ATTORNEY GENERAL

Expungement of Multiple Offenses. — Where a person is charged or convicted of several misdemeanor offenses, and the charges are not consolidated for trial and judgment, nor arise from the same transaction or occurrence, the court may not order an expungement of the multiple offenses pursuant to this section and § 15A-146. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

Construction. — This section and § 15A-146 which prescribe procedures for expunction of criminal records, operate as exceptions to the general prohibition to the alteration of records. Thus, the statutes should be strictly construed. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

Multiple Expunctions Not Authorized. — The precise language of this section clearly does not authorize multiple expunctions or one expunction of multiple offenses. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

§ 15A-146. Expunction of records when charges are dismissed or there are findings of not guilty.

(a) If any person is charged with a crime, either a misdemeanor or a felony, and the charge is dismissed, or a finding of not guilty is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person had not previously received an expungement and that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(b) The court may also order that the said entries shall be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The costs of expunging such records shall be taxed against the petitioner.

(c) The Clerk of Superior Court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted an expungement under the provisions of this section and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted such expungement. The information contained in such files shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expungement. (1979, c. 61; 1985, c. 636, ss. 1-7; 1991, c. 326, s. 1.)

CASE NOTES

Cited in Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

OPINIONS OF ATTORNEY GENERAL

Expungement of Multiple Offenses. — Where a person is charged or convicted of several misdemeanor offenses, and the charges are not consolidated for trial and judgment, nor arise from the same transaction or occurrence, the court may not order an expungement of the multiple offenses pursuant to § 15A-145 and this section. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

An expungement should only be allowed for a singular offense and not for multiple offenses occurring over a period of time. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

Construction. — Section 15A-145 and this section which prescribe procedures for expunction of criminal records, operate as exceptions to the general prohibition to the alteration of records. Thus, the statutes should be strictly construed. See opinion of Attorney General to James J. Coman, Director, State Bureau of Investigation, — N.C.A.G. — (January 3, 1996).

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 9.

Search and Seizure by Consent.

§ 15A-221. General authorization; definition of "consent".

CASE NOTES

Consent Did Not Need to Be in Writing. — In its order, the trial court found that the defendant refused to sign a consent form and then concluded that the State had failed to satisfy its burden of proving that the defendant had given consent to search. The trial court's finding did not support its conclusion, and the conclusion appeared to be based on a legal misperception that consent must be in writing to be valid. There is no requirement that consent to search be made in writing, and the trial court's order simply did not resolve the issue of fact of whether the defendant gave his oral consent to search the vehicle. The evidence at the suppression hearing presented a question of fact which can be resolved only by the factfinder, largely on the credibility of the witnesses, and the case had to be remanded for a new hearing on defendant's motion to suppress. State v. Ghaffar, 93 N.C. App. 281, 377 S.E.2d 818 (1989).

Person Without Title Without Standing to Object to Search of Car. — Burglary defendant had no standing to object to the search of a car from which evidence was taken by the FBI, where, although defendant had paid $3,500 of the $4,000 purchase price, the owner of the car dealership retained title and had given his consent to the search. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Applied in State v. McDaniels, 103 N.C. App. 175, 405 S.E.2d 358 (1991); State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Cited in State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991).

§ 15A-222. Person from whom effective consent may be obtained.

CASE NOTES

This statute places no express restriction on the authority of a wife to consent to a search of the premises she shares with her husband. Nor can such a restriction fairly be read into the broad language, since a wife clearly is "a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of [the] premises" she shares with her husband. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

A person may consent to a search of premises he or she jointly uses or occupies with another, and evidence found pursuant to such a search may constitutionally be used against the other if the person giving consent to the search has rights of use or occupation at least equal to those of the other. State v. Sturke, 91 N.C. App. 249, 371 S.E.2d 288, cert. denied, 323 N.C. 369, 479, 373 S.E.2d 297 (1988).

Person Without Title Without Standing to Object to Search of Car. — Burglary defendant had no standing to object to the search of a car from which evidence was taken by the FBI, where, although defendant had paid $3,500 of the $4,000 purchase price, the owner of the car dealership retained title and had given his consent to the search. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Valid Third Party Consent for Search Shown. — Finding by the trial court that there was valid third party consent to search defendant's residence was supported by evidence where defendant's mother, who owned residence and lived there with him, gave police permission to search residence, including defendant's bedroom, and when asked if defendant was paying rent, she replied "No" but also said that defendant was "paying his way". State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989).

Applied in State v. McDaniels, 103 N.C. App. 175, 405 S.E.2d 358 (1991).

Cited in State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991).

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

CASE NOTES

II. Search Incident to Arrest or Other Detention.

II. SEARCH INCIDENT TO ARREST OR OTHER DETENTION.

Search Incident to Lawful Arrest, etc. —

In accord with first paragraph in the main volume. See State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

ARTICLE 11.

Search Warrants.

§ 15A-242. Items subject to seizure under a search warrant.

CASE NOTES

Cited in State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

§ 15A-243. Who may issue a search warrant.

CASE NOTES

Quoted in State v. Pennington, 327 N.C. 89, 393 S.E.2d 847 (1990).

§ 15A-244. Contents of the application for a search warrant.

CASE NOTES

I. General Consideration.
II. Probable Cause.
III. Affidavits and Informants.

I. GENERAL CONSIDERATION.

The good faith exception to the exclusionary rule only arises upon the exclusion of evidence based upon federal constitutional grounds. State v. Hyleman, 324 N.C. 506, 379 S.E.2d 830 (1989).

Cited in State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988).

II. PROBABLE CAUSE.

"Probable Cause" Defined. — The standard definition of probable cause is reasonable grounds to believe a search of the premises would produce the objects sought and that the objects would aid in the apprehension or conviction of the offender. State v. Crawford, 104 N.C. 591, 410 S.E.2d 499 (1991).

In applying the "totality of the circumstances" test, great deference should be paid a magistrate's determination of probable cause and after-the-fact scrutiny should not take the form of a de novo review. State v. Graham, 90 N.C. App. 564, 369 S.E.2d 615 (1988).

When Evidence of Previous Criminal Activity Supports Warrant. — Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support search warrant: (1) the amount of the criminal activity, and (2) the time period over which the activity occurred. Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best. However, where affidavit properly recites facts indicating activity of protracted and continuous nature, a course of conduct, the passage of time becomes less significant. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Determination of Whether Evidence Is Stale. — When evidence of previous criminal activity is advanced to support a finding of probable cause, further examination must be made to determine if the evidence of prior activity is stale. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Continuity of offense may be the most important factor in determining whether probable cause is valid or stale. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

There was sufficient probable cause where search warrant was issued in reliance upon recitation in affidavit of a controlled purchase of cocaine six days prior to the date of application. State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995).

As to sufficiency of information concerning location of objects, see State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Inference Upheld. — Where suspect, previously convicted of selling drugs, had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and at two of those locations he had sold cocaine, based on these facts, it was reasonable to infer that when suspect occupied third room, he still possessed the cocaine. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Sufficiency of Probable Cause. — Where magistrate had before him evidence (1) that suspect had a pound of marijuana in her home a week earlier, (2) that suspect had sold marijuana the day warrant was issued, and (3) that suspect had a prior history of involvement with drugs (and was still on probation for violation of the Controlled Substances Act), there was a substantial basis to support a finding of probable cause for issuance of a search warrant. State v. Beam, 325 N.C. 217, 381 S.E.2d 327 (1989).

Facts were sufficient under the "totality of the circumstances" test to support a finding of probable cause when officers received information from an informant who admitted past use of cocaine and who had previously given information that led to the arrest of at least six people, since the information provided a substantial basis for the probability that cocaine was present in the described residence and had been sold there within the preceding 48 hours. State v. Graham, 90 N.C. App. 564, 369 S.E.2d 615 (1988).

III. AFFIDAVITS AND INFORMANTS.

Section Does Not Require Separate Writing Labelled "Affidavit". — Although a separate paper identified as an affidavit was not submitted with officers' sworn application, statutory requirements were met and search warrant was properly issued; this section does not require that an officer submit a separate sworn writing labelled "Affidavit" even when its contents would be a verbatim duplication of the sworn statement in the application. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Affidavits must establish a nexus between the objects sought and the place to be searched. Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that fruits of a crime that occurred elsewhere are observed at certain place. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Application for a search warrant failed to comply with this section where the affiant failed to state what information he received from informants during and after purchase of cocaine; and where the affidavit failed to disclose any facts that would lead affiant or a magistrate to reasonably believe that identified currency and contraband were at defendant's residence. State v. Hyleman, 324 N.C. 506, 379 S.E.2d 830 (1989).

Requirements Where Affidavit Based on Hearsay. —

If the affidavit is based on hearsay information, then it must contain the circumstances underlying the informer's reliability and the basis for the informer's belief that a search will recover the objects sought by the police. State v. Crawford, 104 N.C. 591, 410 S.E.2d 499 (1991).

Establishment of Informant's Reliability. —

Where the affidavit contained information to establish that the informant had been to defendants' residence within 48 hours before the application for the warrant was presented to the magistrate and had personally observed defendants' brother in possession of cocaine, and where the affidavit revealed that the informant was familiar with the appearance of cocaine prepared for sale, and where the informant was known to the affiants for a period of six months to one and one-half years and had provided reliable information which had resulted in numerous drug arrests, the affidavit contained sufficient details to support informant's credibility and a finding of probable cause. State v. King, 92 N.C. App. 75, 373 S.E.2d 566 (1988).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

CASE NOTES

I. General Consideration.
II. Probable Cause.
III. Affidavits.

I. GENERAL CONSIDERATION.

Failure to File with Clerk Did Not Require Suppression. — Although application and search warrant were not filed with the clerk as required by statute, the violation did not require that the seized evidence be suppressed; the failure to timely file these documents with the clerk after the warrant was issued did not rise to the level of a constitutional violation that would require suppression under § 15A-974(2). State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Cited in State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

II. PROBABLE CAUSE.

When Evidence of Previous Criminal Activity Supports Warrant. — Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support search warrant: (1) the amount of the criminal activity, and (2) the time period over which the activity occurred. Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best. However, where affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Need to Determine If Evidence Is Stale. — When evidence of previous criminal activity is advanced to support finding of probable cause, further examination must be made to determine if evidence of prior activity is stale. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Continuity of offense may be the most important factor in determining whether probable cause is valid or stale. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Inference Upheld. — Where suspect, previously convicted of selling drugs, had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and at two of those locations he had sold cocaine, based on these facts, it was reasonable to infer that when suspect occupied third room, he still possessed the cocaine. State v. McCoy, 100 N.C. App. 574, 397 S.E.2d 355 (1990).

Double Hearsay in Application. — Where the application for a warrant contained "double hearsay," but did not adequately explain why this "double hearsay" was credible, the information contained in the affidavit and on the face of the warrant was inadequate to establish that probable cause existed for the issuance of the warrant. State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385, temporary stay granted, 338 N.C. 313, 450 S.E.2d 486 (1994).

III. AFFIDAVITS.

Affidavit Held Sufficient to Establish Probable Cause. — Where affidavit clearly stated that the residence to be searched was occupied by defendant and his brothers, that witnesses had identified one of defendant's brothers, and that a reliable informant had stated that a shotgun was at the residence, the affidavit disclosed sufficient information for a reviewing magistrate to determine that there was probable cause. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

§ 15A-246. Form and content of the search warrant.

CASE NOTES

Cited in State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988).

§ 15A-247. Who may execute a search warrant.

CASE NOTES

Applied in State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

§ 15A-249. Officer to give notice of identity and purpose.

CASE NOTES

Notice Held Sufficient. — Police officers who wore search and raid jackets which identified them and their purpose when they entered defendant's business yelling "police officers, search warrant" complied with the requirements of this section. State v. Moose, 101 N.C. App. 59, 398 S.E.2d 898 (1990), discretionary review denied, 328 N.C. 575, 403 S.E.2d 519 (1991).

Applied in State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

Cited in State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995).

§ 15A-251. Entry by force.

CASE NOTES

Announcement by Police Facing Exigent Circumstances. — The fact that officers did announce their identity and purpose does not mean entry by force cannot be justified; there is nothing in the statute to forbid an announcement of police presence and purpose when officers also face exigent circumstances.

State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995).

Search Conducted in Accordance with Section. — The trial court had a reasonable basis for concluding that search was conducted in accordance with this section; where testimony from officer was that during time between announcement and opening of door, he heard the sounds of people running and faintly heard the word "police," and where officer testified that he ordered the door opened "because evidence of this nature ... is easily disposed of, and quick entry is safer for the officers," as such evidence indicated circumstances under which the officers could have reasonably believed that they were being denied access and that evidence could be destroyed. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Applied in State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

§ 15A-252. Service of a search warrant.

CASE NOTES

This section must be construed with reference to other provisions of Chapter 15A relating to search warrants, as where possible statutes dealing with the same subject matter must be harmonized to give effect to each. State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

Precautionary Measures Prior to Service of Warrant Not Proscribed. — To require officers to serve a warrant prior to taking the precautionary measures authorized by § 15A-255 and § 15A-256 would frustrate the purposes of the statutes; accordingly, this section does not prevent officers from locating, detaining, or frisking individuals on the premises prior to serving the warrant. State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

Applied in State v. Moose, 101 N.C. App. 59, 398 S.E.2d 898 (1990).

Cited in State v. O'Kelly, 98 N.C. App. 265, 390 S.E.2d 717 (1990); State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

CASE NOTES

I. General Consideration.
II. Plain View.

I. GENERAL CONSIDERATION.

Applied in State v. White, 322 N.C. 770, 370 S.E.2d 390 (1988).

II. PLAIN VIEW.

Seizure of Photographs Where Pornography Suspected. — Where defendant was engaged in illegal drug activity, it was reasonable that the officers could conclude that the large quantity of the photographs, showing women in various stages of dress and undress, could have been connected to pornography, and were properly seized under the plain view doctrine. State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (1994), cert. denied and appeal dismissed, 336 N.C. 75, 445 S.E.2d 39 (1994).

§ 15A-254. List of items seized.

CASE NOTES

Cited in State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. O'Kelly, 98 N.C. App. 265, 390 S.E.2d 717 (1990).

§ 15A-255. Frisk of persons present in premises or vehicle to be searched.

CASE NOTES

Frisk of Lounge Patron. — Frisk procedure engaged in by Alcohol Law Enforcement agents and deputy sheriffs in the course of the search of a lounge pursuant to a valid search warrant did not violate the constitutional rights of patron of the lounge. State v. Davis, 94 N.C. App. 358, 380 S.E.2d 378 (1989).

Cited in State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

§ 15A-256. Detention and search of persons present in private premises or vehicle to be searched.

CASE NOTES

Cited in State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

§ 15A-257. Return of the executed warrant.

CASE NOTES

Cited in State v. O'Kelly, 98 N.C. App. 265, 390 S.E.2d 717 (1990).

§ 15A-258. Disposition of seized property.

CASE NOTES

Release of Currency to Federal Drug Enforcement Administration. — This section does not require that a court order be obtained prior to any release of seized property, and it expressly authorizes property to be held by any law-enforcement agency; therefore, the release of currency to Federal Drug Enforcement Administration did not violate this section. State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990).

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Necessity of Court Order. — In the absence of a pre-existing valid court order directing that property seized pursuant to a search warrant or other lawful authority be retained by the court or delivered to another court, a law enforcement agency in possession of the property is not required to obtain a court order prior to releasing it. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

ARTICLE 12.

Pen Registers; Trap and Trace Devices.

§ 15A-260. Definitions.

CASE NOTES

Cited in United States v. Suarez, 906 F.2d 977 (4th Cir. 1990); State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (1995).

§ 15A-261. Prohibition and exceptions.

(a) In General. — Except as provided in subsection (b) of this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order as provided in this Article.

(b) Exception. — The prohibition of subsection (a) of this section does not apply to the use of a pen register or a trap and trace device by a provider of wire or electronic communication service:

(1) Relating to the operation, maintenance, or testing of a wire or electronic communication service or to the protection of the rights or property of the provider, or to the protection of users of that service from abuse of service or unlawful use of service; or

(2) To record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or

(3) With the consent of the user of that service.

(c) Penalty. — A person who willfully and knowingly violates subsection (a) of this section is guilty of a Class 1 misdemeanor. (1987 (Reg. Sess., 1988), c. 1104, s. 1; 1993, c. 539, s. 297; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 297, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 15A-264. Assistance in installation and use of a pen register or a trap and trace device.

CASE NOTES

Cited in State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (1995).

ARTICLE 13.

DNA Database and Databank.

§ 15A-266. Short title.

This Article may be cited as the DNA Database and Databank Act of 1993. (1993, c. 401, s. 1.)

Editor's Note. — Session Laws 1993, c. 401, s. 2 makes this Article effective December 1, 1993, only if the General Assembly appropriates funds to implement the purposes of the act. Funds have been so appropriated.

Legal Periodicals. — For comment, "DNA Databases: The Case for the Combined DNA Index System," see 29 Wake Forest L. Rev. 889 (1994).

§ 15A-266.1. Policy.

It is the policy of the State to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of violent crimes against the person. Identification, detection, and exclusion is facilitated by the analysis of biological evidence that is often left by the perpetrator or is recovered from the crime scene. The analysis of biological evidence can also be used to identify missing persons and victims of mass disasters. (1993, c. 401, s. 1.)

CASE NOTES

Drawing Blood for DNA Testing Constitutional. — Drawing of blood from prison inmates for deoxyribonucleic acid (DNA) sampling did not violate the fourth amendment's prohibition of unreasonable search and seizure. Sanders v. Coman, 864 F. Supp. 496 (E.D.N.C. 1994).

Force Used to Obtain DNA Samples Was Not Excessive. — Ensuring compliance with a lawful order, such as the deoxyribonucleic acid (DNA) sampling procedure, was a matter of institutional security and discipline; therefore, the actual force used did not constitute cruel and unusual punishment simply because it caused pain to the inmates involved. There were no facts or allegations that the force being used to obtain DNA samples from inmates was being applied with the intention of harming the inmates. Sanders v. Coman, 864 F. Supp. 496 (E.D.N.C. 1994).

§ 15A-266.2. Definitions.

As used in this Article, unless another meaning is specified or the context clearly requires otherwise, the following terms have the meanings specified:

(1) "CODIS" means the FBI's national DNA identification index system that allows the storage and exchange of DNA records submitted by State and local forensic DNA laboratories. The term "CODIS" is derived from Combined DNA Index System.

(2) "DNA" means deoxyribonucleic acid. DNA is located in the nucleus of cells and provides an individual's personal genetic blueprint. DNA encodes genetic information that is the basis of human heredity and forensic identification.

(3) "DNA Record" means DNA identification information stored in the State DNA Database or CODIS for the purpose of generating investigative leads or supporting statistical interpretation of DNA test results. The DNA record is the result obtained from the DNA typing tests. The DNA record is comprised of the characteristics of a DNA sample which are of value in establishing the identity of individuals. The results of all DNA identification tests on an individual's DNA sample are also collectively referred to as the DNA profile of an individual.

(4) "DNA Sample" in this Article means a blood sample provided by any person convicted of offenses covered by this Article or submitted to the SBI Laboratory for analysis pursuant to a criminal investigation.

(5) "FBI" means the Federal Bureau of Investigation.

(6) "SBI" means the State Bureau of Investigation. The SBI is responsible for the policy management and administration of the State DNA identification record system to support law enforcement, and for liaison with the FBI regarding the State's participation in CODIS.

(7) "State DNA Database" means the SBI's DNA identification record system to support law enforcement. It is administered by the SBI and provides DNA records to the FBI for storage and maintenance in CODIS. The SBI's DNA Database system is the collective capability provided by computer software and procedures administered by the SBI to store and maintain DNA records related to forensic casework, to convicted offenders required to provide a DNA sample under this Article, and to anonymous DNA records used for research or quality control.

(8) "State DNA Databank" means the repository of DNA samples collected under the provisions of this Article. (1993, c. 401, s. 1.)

Legal Periodicals. — For comment, "DNA Databases: The Case for the Combined DNA Index System," see 29 Wake Forest L. Rev. 889 (1994).

§ 15A-266.3. Procedural compatibility with the FBI.

The DNA identification system as established by the SBI shall be compatible with the procedures specified by the FBI, including use of comparable test procedures, laboratory equipment, supplies, and computer software. (1993, c. 401, s. 1.)

§ 15A-266.4. Blood sample required for DNA analysis upon conviction.

(a) On or after 1 July 1994, a person who is convicted of any of the crimes listed in subsection (b) of this section shall have a DNA sample drawn upon intake to a jail or prison. In addition, every person convicted on or after 1 July 1994, of any of these crimes, but who is not sentenced to a term of confinement, shall provide a DNA sample as a condition of the sentence. A person who has been convicted and incarcerated as a result of a conviction of one or more of these crimes prior to 1 July 1994 shall have a DNA sample drawn before parole or release from the penal system.

(b) Crimes covered by this Article include:

G.S. 14-17 — Murder in the first and second degree.
G.S. 14-27.2 — First degree rape.
G.S. 14-27.3 — Second degree rape.
G.S. 14-27.4 — First degree sexual offense.
G.S. 14-27.5 — Second degree sexual offense.
G.S. 14-28 — Malicious castration.
G.S. 14-29 — Castration or other maiming.
G.S. 14-30 — Malicious maiming.
G.S. 14-30.1 — Malicious throwing of corrosive acid or alkali.
G.S. 14-31 — Malicious assault in secret manner.
G.S. 14-32 — Felonious assault with deadly weapon with intent to kill.
G.S. 14-32.1 — Assaults on handicapped persons.
G.S. 14-34.1 — Discharging barreled weapon or firearm into occupied property.
G.S. 14-34.2 — Assault with firearm or other deadly weapon upon law enforcement officer, fireman, or EMS personnel.
G.S. 14-39(a)(3) — Kidnapping for the purpose of doing serious bodily harm to the person.
G.S. 14-49 — Malicious use of explosive or incendiary.
G.S. 14-58.2 — Burning of mobile home, manufactured-type house, or recreational trailer home.
G.S. 14-202.1 — Taking indecent liberties with children.
G.S. 14-87 — Robbery with a dangerous weapon.
G.S. 14-277.3 — Stalking.
— Common law robbery.
— First degree arson.

(1993, c. 401, s. 1.)

§ 15A-266.5. Tests to be performed on blood sample.

(a) The tests to be performed on each blood sample are:

(1) To analyze and type the genetic markers contained in or derived from the DNA.
(2) For law enforcement identification purposes.
(3) For research and administrative purposes, including:
  a. Development of a population database when personal identifying information is removed.
  b. To support identification research and protocol development of forensic DNA analysis methods.
  c. For quality control purposes.
  d. To assist in the recovery or identification of human remains from mass disasters or for other humanitarian purposes, including identification of missing persons.

(b) The DNA record of identification characteristics resulting from the DNA testing shall be stored and maintained by the SBI in the State DNA Database. The DNA sample itself will be stored and maintained by the SBI in the State DNA Databank. (1993, c. 401, s. 1.)

Legal Periodicals. — For comment, "DNA Databases: The Case for the Combined DNA Index System," see 29 Wake Forest L. Rev. 889 (1994).

§ 15A-266.6. Procedures for withdrawal of blood sample for DNA analysis.

Each DNA sample required to be drawn pursuant to G.S. 15A-266.4 from persons who are incarcerated shall be drawn at the place of incarceration. DNA samples from persons who are not sentenced to a term of confinement shall be drawn at a prison or jail unit to be specified by the sentencing court. Only a correctional health nurse technician, physician, registered professional nurse, licensed practical nurse, laboratory technician, phlebotomist, or other health care worker with phlebotomy training shall draw any DNA sample to be submitted for analysis. No civil liability shall attach to any person authorized to draw blood by this section as a result of drawing blood from any person if the blood was drawn according to recognized medical procedures. No person shall be relieved from liability for negligence in the drawing of any DNA sample. (1993, c. 401, s. 1.)

§ 15A-266.7. Procedures for conducting DNA analysis of blood sample.

The SBI shall adopt rules governing the procedures to be used in the submission, identification, analysis, and storage of DNA samples and typing results of DNA samples submitted under this Article. The DNA sample shall be securely stored in the State Databank. The typing results shall be securely stored in the State Database. These procedures shall also include quality assurance guidelines to insure that DNA identification records meet standards and audit standards for laboratories which submit DNA records to the State Database. Records of testing shall be retained on file at the SBI. (1993, c. 401, s. 1.)

§ 15A-266.8. DNA database exchange.

(a) It shall be the duty of the SBI to receive DNA samples, to store, to analyze or to contract out the DNA typing analysis to a qualified DNA laboratory that meets the guidelines as established by the SBI, classify, and file the DNA record of identification characteristic profiles of DNA samples submitted pursuant to G.S. 15A-266.7 and to make such information available as provided in this section. The SBI may contract out DNA typing analysis to a qualified DNA laboratory that meets guidelines as established by the SBI. The results of the DNA profile of individuals in the State Database shall be made available to local, State, or federal law enforcement agencies, approved crime laboratories which serve these agencies, or the district attorney's office upon written or electronic request and in furtherance of an official investigation of a criminal offense. These records shall also be available upon receipt of a valid court order directing the SBI to release these results to appropriate parties not listed above, when the court order is signed by a superior court judge after a hearing. The SBI shall maintain a file of such court orders.

(b) The SBI shall adopt rules governing the methods of obtaining information from the State Database and CODIS and procedures for verification of the identity and authority of the requester.

(c) The SBI shall create a separate population database comprised of blood samples obtained under this Article, after all personal identification is removed. Nothing shall prohibit the SBI from sharing or disseminating population databases with other law enforcement agencies, crime laboratories that serve them, or other third parties the SBI deems necessary to assist the SBI with statistical analysis of the SBI's population databases. The population database may be made available to and searched by other agencies participating in the CODIS system. (1993, c. 401, s. 1.)

§ 15A-266.9. Cancellation of authority to exchange DNA records.

The SBI is authorized to revoke the right of a forensic DNA laboratory within the State to exchange DNA identification records with federal, State, or local criminal justice agencies if the required control and privacy standards specified by the SBI for the State DNA Database are not met by these agencies. (1993, c. 401, s. 1.)

§ 15A-266.10. Expungement.

(a) Any person whose DNA record or profile has been included in the State Database and whose DNA sample is stored in the State Databank may apply for expungement on the grounds that the felony conviction that resulted in the inclusion of the person's DNA record or profile in the State Database or the inclusion of the person's DNA sample in the State Databank has been reversed and the case dismissed. The person, either individually or through an attorney, may apply to the court for expungement of the record as provided in G.S. 15A-146. A copy of the application for expungement shall be served on the district attorney for the judicial district in which the felony conviction was obtained not less than 20 days prior to the date of the hearing on the application. A certified copy of the order reversing and dismissing the conviction shall be attached to an order of expungement.

(b) Upon receipt of an order of expungement, the SBI shall purge the DNA record and all other identifiable information from the State Database and the DNA sample stored in the State Databank covered by the order. If the individual has more than one entry in the State Database and Databank, then only the entry covered by the expungement order shall be deleted from the State Database or Databank. (1993, c. 401, s. 1.)

§ 15A-266.11. Unauthorized uses of DNA Databank; penalties.

(a) Any person who, by virtue of employment, or official position, has possession of, or access to, individually identifiable DNA information contained in the State DNA Database or Databank and who willfully discloses it in any manner to any person or agency not entitled to receive it is guilty of a Class 1 misdemeanor in accordance with G.S. 14-3.

(b) Any person who, without authorization, willfully obtains individually identifiable DNA information from the State DNA Database or Databank is guilty of a Class 1 misdemeanor in accordance with G.S. 14-3. (1993, c. 401, s. 1; 1994, Ex. Sess., c. 14, s. 15.)

Editor's Note. — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994 Extra Session, c. 14, s. 15, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date.

§ 15A-266.12. Confidentiality of records.

(a) All DNA profiles and samples submitted to the SBI pursuant to this Article shall be treated as confidential except as provided in G.S. 15A-266.8.

(b) Only DNA records that directly relate to the identification of individuals shall be collected and stored. These records shall not be used for any purpose other than to facilitate personal identification of an offender; provided that in appropriate circumstances such records may be used to identify potential victims of mass disasters or missing persons. (1993, c. 401, s. 1.)

§§ 15A-267 through 15A-270: Reserved for future codification purposes.

ARTICLE 14.

Nontestimonial Identification.

§ 15A-271. Authority to issue order.

Legal Periodicals. — For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

Article Inapplicable to In-Custody Accused. — This Article applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in-custody accused. State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986); State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

Hair Sample Admitted. — Trial court did not err in denying defendant's motion to suppress evidence of hair samples taken in compliance with a nontestimonial identification order entered pursuant to this section. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Applied in State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991).

§ 15A-272. Time of application; additional investigative procedures not precluded.

Legal Periodicals. — For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

§ 15A-273. Basis for order.

Legal Periodicals. — For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

Applied in State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991).

Cited in State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

§ 15A-274. Issuance of order.

Legal Periodicals. — For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

CASE NOTES

Cited in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

§ 15A-278. Contents of order.

Legal Periodicals. — For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

§ 15A-279. Implementation of order.

Legal Periodicals. — For note, "DNA Typing: A New Investigatory Tool," see 1989 Duke L.J. 474.

§ 15A-281. Nontestimonial identification order at request of defendant.

CASE NOTES

Applied in State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991).

ARTICLE 16.

Electronic Surveillance.

§ 15A-286. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

(2) "Attorney General" means the Attorney General of the State of North Carolina, unless otherwise specified.

(3) "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(4) "Chapter 119 of the United States Code" means Chapter 119 of Part I of Title 18, United States Code, being Public Law 90-351, the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986.

(5) "Communications common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of Title 47 of the United States Code.

(6) "Contents" when used with respect to any wire, oral, or electronic communication means and includes any information concerning the substance, purport, or meaning of that communication.

(7) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than:

a. Any telephone or telegraph instrument, equipment, or facility, or any component thereof:

1. Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by the subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

2. Being used by a provider of wire or electronic communication service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of the officer's duties.

b. A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(8) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce but does not include:

a. Any wire or oral communication;

b. Any communication made through a tone-only paging device; or

c. Any communication from a tracking device (as defined in section 3117 of Title 18 of the United States Code).

(9) "Electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications.

(10) "Electronic communication system" means any wire, radio, electronic, magnetic, photooptical, or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the storage of such communications.

(11) "Electronic surveillance" means the interception of wire, oral, or electronic communications as provided by this Article.

(12) "Electronic storage" means:
  a. Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
  b. Any storage of such communication by an electronic communication service for the purposes of backup protection of the communication.

(13) "Intercept" means the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device.

(14) "Investigative or law enforcement officer" means any officer of the State of North Carolina or any political subdivision thereof, who is empowered by the laws of this State to conduct investigations of or to make arrests for offenses enumerated in G.S. 15A-290, and any attorney authorized by the laws of this State to prosecute or participate in the prosecution of those offenses, including the Attorney General of North Carolina.

(15) "Judge" means any judge of the trial divisions of the General Court of Justice.

(16) "Judicial review panel" means a three-judge body, composed of such judges as may be assigned by the Chief Justice of the Supreme Court of North Carolina, which shall review applications for electronic surveillance orders and may issue orders valid throughout the State authorizing such surveillance as provided by this Article, and which shall submit a report of its decision to the Chief Justice.

(17) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but the term does not include any electronic communication.

(18) "Person" means any employee or agent of the United States or any state or any political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.

(19) "Readily accessible to the general public" means, with respect to a radio communication, that the communication is not:
  a. Scrambled or encrypted;
  b. Transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of the communication;

c. Carried on a subcarrier or other signal subsidiary to a radio transmission;

d. Transmitted over a communications system provided by a common carrier, unless the communication is a tone-only paging system communication; or

e. Transmitted on frequencies allocated under Part 25, Subpart D, E, or F or Part 94 of the Rules of the Federal Communications Commission as provided by 18 U.S.C. § 2510(16)(E).

(20) "User" means any person or entity who:

a. Uses an electronic communications service; and

b. Is duly authorized by the provider of the service to engage in the use.

(21) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and the term includes any electronic storage of such communication, but the term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit. (1995, c. 407, s. 1.)

Editor's Note. — Session Laws 1995, c. 407, s. 3, made this Article effective December 1, 1995.

§ 15A-287. Interception and disclosure of wire, oral, or electronic communications prohibited.

(a) Except as otherwise specifically provided in this Article, a person is guilty of a Class H felony if, without the consent of at least one party to the communication, the person:

(1) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.

(2) Willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

a. The device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communications; or

b. The device transmits communications by radio, or interferes with the transmission of such communications.

(3) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through violation of this Article; or

(4) Willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Article.

(b) It is not unlawful under this Article for any person to:

(1) Intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public;

(2) Intercept any radio communication which is transmitted:

a. For use by the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

b. By any governmental, law enforcement, civil defense, private land mobile, or public safety communication system, including police and fire, readily available to the general public;

c. By a station operating on any authorized band within the bands allocated to the amateur, citizens band, or general mobile radio services; or

d. By any marine or aeronautical communication system; or

(3) Intercept any communication in a manner otherwise allowed by Chapter 119 of the United States Code.

(c) It is not unlawful under this Article for an operator of a switchboard, or an officer, employee, or agent of a provider of electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of employment while engaged in any activity that is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the provider of that service, provided that a provider of wire or electronic communication service may not utilize service observing or random monitoring except for mechanical or service quality control checks.

(d) It is not unlawful under this Article for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of Chapter 5 of Title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(e) Any person who, as a result of the person's official position or employment, has obtained knowledge of the contents of any wire, oral, or electronic communication lawfully intercepted pursuant to an electronic surveillance order or of the pendency or existence of or implementation of an electronic surveillance order who shall knowingly and willfully disclose such information for the purpose of hindering or thwarting any investigation or prosecution relating to the subject matter of the electronic surveillance order, except as is necessary for the proper and lawful performance of the duties of his position or employment or as shall be required or allowed by law, shall be guilty of a Class G felony.

(f) Any person who shall, knowingly or with gross negligence, divulge the existence of or contents of any electronic surveillance order in a way likely to hinder or thwart any investigation or prosecution relating to the subject matter of the electronic surveillance order or anyone who shall, knowingly or with gross negligence, release the contents of any wire, oral, or electronic communication intercepted under an electronic surveillance order, except as is necessary for the proper and lawful performance of the duties of his position or employment or as is required or allowed by law, shall be guilty of a Class 1 misdemeanor.

(g) Any public officer who shall violate subsection (a) or (d) of this section or who shall knowingly violate subsection (e) of this section shall be removed from any public office he may hold and shall thereafter be ineligible to hold any public office, whether elective or appointed. (1995, c. 407, s. 1.)

§ 15A-288. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited.

(a) Except as otherwise specifically provided in this Article, a person is guilty of a Class H felony if the person:

(1) Manufactures, assembles, possesses, purchases, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

(2) Places in any newspaper, magazine, handbill, or other publication, any advertisement of:

a. Any electronic, mechanical, or other device knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications; or

b. Any other electronic, mechanical, or other device where the advertisement promotes the use of the device for the purpose of the surreptitious interception of wire, oral, or electronic communications.

(b) It is not unlawful under this section for the following persons to manufacture, assemble, possess, purchase, or sell any electronic, mechanical, or other device, knowing or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications:

(1) A communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, acting in the normal course of the communications common carrier's business, or

(2) An officer, agent, or employee of, or a person under contract with, the State, acting in the course of the activities of the State, and with the written authorization of the Attorney General.

(c) An officer, agent, or employee of, or a person whose normal and customary business is to design, manufacture, assemble, advertise and sell electronic, mechanical and other devices primarily useful for the purpose of the surreptitious interceptions of wire, oral, or electronic communications, exclusively for and restricted to State and federal investigative or law enforcement agencies and departments. (1995, c. 407, s. 1.)

§ 15A-289. Confiscation of wire, oral, or electronic communication interception devices.

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of G.S. 15A-288 may be seized and forfeited to this State. (1995, c. 407, s. 1.)

§ 15A-290. Offenses for which orders for electronic surveillance may be granted.

(a) Orders authorizing or approving the interception of wire, oral, or electronic communications may be granted, subject to the provisions of this Article and Chapter 119 of the United States Code, when the interception:

(1) May provide or has provided evidence of the commission of, or any conspiracy to commit:
  a. Any of the drug-trafficking violations listed in G.S. 90-95(h); or
  b. A continuing criminal enterprise in violation of G.S. 90-95.1.

(2) May expedite the apprehension of persons indicted for the commission of, or any conspiracy to commit, an offense listed in subdivision (1) of this subsection.

(b) Orders authorizing or approving the interception of wire, oral, or electronic communications may be granted, subject to the provisions of this Article and Chapter 119 of the United States Code, when the interception may provide, or has provided, evidence of any offense that involves the commission of, or any conspiracy to commit, murder, kidnapping, hostage taking, robbery, extortion, bribery, rape, or any sexual offense, or when the interception may expedite the apprehension of persons indicted for the commission of these offenses.

(c) Orders authorizing or approving the interception of wire, oral, or electronic communications may be granted, subject to the provisions of this Article and Chapter 119 of the United States Code, when the interception may provide, or has provided, evidence of any of the following offenses, or any conspiracy to commit these offenses, or when the interception may expedite the apprehension of persons indicted for the commission of these offenses:

(1) Any felony offense against a minor, including any violation of G.S. 14-27.7 (Intercourse and sexual offenses with certain victims; consent no defense), G.S. 14-41 (Abduction of children), G.S. 14-190.16 (First degree sexual exploitation of a minor), G.S. 14-190.17 (Second degree sexual exploitation of a minor), G.S. 14-190.18 (Promoting prostitution of a minor), G.S. 14-190.19 (Participating in prostitution of a minor), or G.S. 14-202.1 (Taking indecent liberties with children).

(2) Any felony obstruction of a criminal investigation, including any violation of G.S. 14-221.1 (Altering, destroying, or stealing evidence of criminal conduct).

(3) Any felony offense involving interference with, or harassment or intimidation of, jurors or witnesses, including any violation of G.S. 14-225.2 or G.S. 14-226.

(4) Any felony offense involving assault or threats against any executive or legislative officer in violation of Article 5A of

Chapter 14 of the General Statutes or assault with a firearm or other deadly weapon upon governmental officers or employees in violation of G.S. 14-34.2.

(5) Any offense involving the manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapons of mass death or destruction in violation of G.S. 14- 288.8 or the adulteration or misbranding of food, drugs, cosmetics, etc., with the intent to cause serious injury in violation of G.S. 14-34.4.

(d) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized, intercepts wire, electronic, or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in G.S. 15A-294(a) and (b). Such contents and any evidence derived therefrom may be used in accordance with G.S. 15A-294(c) when authorized or approved by a judicial review panel where the panel finds, on subsequent application made as soon as practicable, that the contents were otherwise intercepted in accordance with this Article or Chapter 119 of the United States Code.

(e) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this Article or Chapter 119 of the United States Code, shall lose its privileged character. (1995, c. 407, s. 1.)

§ 15A-291. Application for electronic surveillance order; judicial review panel.

(a) The Attorney General may, pursuant to the provisions of section 2516(2) of Chapter 119 of the United States Code, apply to a judicial review panel for an order authorizing or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offenses as to which the application is made, and for such offenses and causes as are enumerated in G.S. 15A-290. A judicial review panel shall be composed of such judges as may be assigned by the Chief Justice of the Supreme Court of North Carolina, which shall review applications for electronic surveillance orders and may issue orders valid throughout the State authorizing such surveillance as provided by this Article, and which shall submit a report of its decision to the Chief Justice. A judicial review panel may be appointed by the Chief Justice pursuant to the Attorney General's written notification of his intent to apply for an electronic surveillance order.

(b) A judicial review panel is hereby authorized to grant orders valid throughout the State for the interception of wire, oral, or electronic communications. Applications for such orders may be made by the Attorney General and by no other person. The Attorney General, in applying for such orders, and a judicial review panel in granting such orders, shall comply with all procedural requirements of section 2518 of Chapter 119 of the United States Code. The Attorney General may make emergency applications as provided by section 2518 of Chapter 119 of the United States Code. In applying section 2518 the word "judge" in that section shall be construed to refer to the judicial review panel, unless the context otherwise indicates. The judicial review panel may stipulate any special conditions it feels necessary to assure compliance with the terms of this act.

(c) No judge who sits as a member of a judicial review panel shall preside at any trial or proceeding resulting from or in any manner related to information gained pursuant to a lawful electronic surveillance order issued by that panel.

(d) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication must be made in writing upon oath or affirmation to the judicial review panel. Each application must include the following information:

(1) The identity of the office requesting the application;
(2) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including:
   a. Details as to the particular offense that has been, or is being committed;
   b. A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;
   c. A particular description of the type of communications sought to be intercepted; and
   d. The identity of the person, if known, committing the offense and whose communications are to be intercepted;
(3) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
(4) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter must be added;
(5) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making adjudication, made to a judicial review panel for authorization to intercept, or for approval of interceptions of wire, oral, or electronic communications involving any of the same persons, facilities, or places specified in the application, and the action taken by that judicial review panel on each such application; and
(6) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(e) Before acting on the application, the judicial review panel may examine on oath the person requesting the application or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the panel in determining whether probable cause exists for the issuance of the order unless the information is either recorded or contemporaneously summarized in the record or on the face of the order by the panel. (1995, c. 407, s. 1.)

§ 15A-292. Request for application for electronic surveillance order.

(a) The head of any municipal, county, or State law enforcement agency or any district attorney may submit a written request to the Attorney General that the Attorney General apply to a judicial review panel for an electronic surveillance order to be executed within the requesting agency's jurisdiction. The written requests shall be on a form approved by the Attorney General and shall provide sufficient information to form the basis for an application for an electronic surveillance order. The head of a law enforcement agency shall also submit a copy of the request to the district attorney, who shall review the request and forward it to the Attorney General along with any comments he may wish to include. The Attorney General is authorized to review the request and decide whether it is appropriate to submit an application to a judicial review panel for an electronic surveillance order. If a request for an application is deemed inappropriate, the Attorney General shall send a signed, written statement to the person submitting the request, and to the district attorney, summarizing the reasons for failing to make an application. If the Attorney General decides to submit an application to a judicial review panel, he shall so notify the requesting agency head, the district attorney, and the head of the local law enforcement agency which has the primary responsibility for enforcing the criminal laws in the location in which it is anticipated the majority of the surveillance will take place, if not the same as the requesting agency head, unless the Attorney General has probable cause to believe that the latter notifications should substantially jeopardize the success of the surveillance or the investigation in general. If a judicial review panel grants an electronic surveillance order, a copy of such order shall be sent to the requesting agency head and the district attorney, and a summary of the order shall be sent to the head of the local law enforcement agency with primary responsibility for enforcing the criminal laws in the jurisdiction where the majority of the surveillance will take place, if not the same as the requesting agency head, unless the judicial review panel finds probable cause to believe that the latter notifications would substantially jeopardize the success of the surveillance or the investigation.

(b) This Article does not limit the authority of the Attorney General to apply for electronic surveillance orders independent of, or contrary to, the requests of law enforcement agency heads, nor does it limit the discretion of the Attorney General in determining whether an application is appropriate under any given circumstances.

(c) The Chief Justice of the North Carolina Supreme Court shall receive a report concerning each decision of a judicial review panel. (1995, c. 407, s. 1.)

§ 15A-293. Issuance of order for electronic surveillance; procedures for implementation.

(a) Upon application by the Attorney General, a judicial review panel may enter an ex parte order, as requested or as modified, authorizing the interception of wire, oral, or electronic communications, if the panel determines on the basis of the facts submitted by the applicant that:

(1) There is probable cause for belief that an individual is

committing, has committed, or is about to commit an offense set out in G.S. 15A-290;

(2) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(3) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and

(4) There is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by the individual described in subdivision (1) of this subsection.

(b) Each order authorizing the interception of any wire, oral, or electronic communications must specify:

(1) The identity of the person, if known, whose communications are to be intercepted;

(2) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted, and the means by which such interceptions may be made;

(3) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(4) The identity of the agency authorized to intercept the communications and of the person requesting the application; and

(5) The period of time during which such interception is authorized, including a statement as to whether or not the interception automatically terminates when the described communication has been first obtained.

(c) No order entered under this Article may authorize the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days. Extensions of an order may be granted, but only upon application for an extension made in accordance with G.S. 15A-291 and the panel making the findings required by subsection (a) of this section. The period of extension may be no longer than the panel determines to be necessary to achieve the purpose for which it was granted and in no event for longer than 15 days. Every order and extension thereof must contain a provision that the authorization to intercept be executed as soon as practicable, be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this Article, and terminate upon attainment of the authorized objective, or in any event in 30 days or 15 days, as is appropriate.

(d) Whenever an order authorizing interception is entered pursuant to this Article, the order may require reports to be made to the issuing judicial review panel showing that progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports must be made at such intervals as the panel may require.

(1) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this Article must be recorded on tape, wire, or electronic or other comparable device. The recording of the contents of any wire, electronic, or oral communication under this subsection must be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, the recordings must be made available to the judicial review panel and sealed under its direction. Custody of the recordings is wherever the panel orders. They may not be destroyed except upon an order of the issuing panel and in any event must be kept for 10 years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of G.S. 15A-294(a) and (b) for investigations. The contents of any wire, oral, or electronic communication or evidence derived therefrom may not be disclosed or used under G.S. 15A-294(c) unless they have been kept sealed.

(2) Applications made and orders granted under this Article must be sealed by the panel. Custody of the applications and orders may be disclosed only upon a showing of good cause before the issuing panel and may not be destroyed except on its order and in any event must be kept for 10 years.

(3) Any violation of the provisions of this subsection may be punished as for contempt.

(e) The State Bureau of Investigation shall own or control and may operate any equipment used to implement electronic surveillance orders issued by a judicial review panel and may operate or use, in implementing any electronic surveillance order, electronic surveillance equipment in which a local government or any of its agencies has a property interest.

(f) The Attorney General shall establish procedures for the use of electronic surveillance equipment in assisting local law enforcement agencies implementing electronic surveillance orders. The Attorney General shall supervise such assistance given to local law enforcement agencies and is authorized to conduct statewide training sessions for investigative and law enforcement officers regarding this Article. (1995, c. 407, s. 1.)

§ 15A-294. Authorization for disclosure and use of intercepted wire, oral, or electronic communications.

(a) Any investigative or law enforcement officer who, by any means authorized by this Article or Chapter 119 of the United States Code, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(b) Any investigative or law enforcement officer, who by any means authorized by this Article or Chapter 119 of the United States Code, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of the officers' official duties.

(c) Any person who has received, by any means authorized by this Article or Chapter 119 of the United States Code, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom, intercepted in accordance with the provisions of this Article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding in any court or before any grand jury in this State, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

(d) Within a reasonable time, but no later than 90 days after the filing of an application for an order or the termination of the period of an order or the extensions thereof, the issuing judicial review panel must cause to be served on the persons named in the order or the application and such other parties as the panel in its discretion may determine, an inventory that includes notice of:

(1) The fact of the entry of the order or the application;
(2) The date of the entry and the period of the authorized interception; and
(3) The fact that during the period wire, oral, or electronic communications were or were not intercepted.

(e) The issuing judicial review panel, upon the filing of a motion, may in its discretion, make available to such person or his counsel for inspection, such portions of the intercepted communications, applications, and orders as the panel determines to be required by law or in the interest of justice.

(f) The contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in any court of this State unless each party, not less than 20 working days before the trial, hearing, or other proceeding, has been furnished with a copy of the order and accompanying application, under which the interception was authorized.

(g) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of this State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that:

(1) The communication was unlawfully intercepted;
(2) The order of authorization under which it was intercepted is insufficient on its face; or
(3) The interception was not made in conformity with the order of authorization.

Such motion must be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of this motion. If the motion is granted, the contents of the intercepted wire, oral, or electronic communication, or evidence derived therefrom, must be treated as having been obtained in violation of this Article.

(h) In addition to any other right to appeal, the State may appeal:

(1) From an order granting a motion to suppress made under subdivision (1) of this subsection, if the district attorney certifies to the judge granting the motion that the appeal is not taken for purposes of delay. The appeal must be taken

within 30 days after the date the order of suppression was entered and must be prosecuted as are other interlocutory appeals; or

(2) From an order denying an application for an order of authorization, and the appeal may be made ex parte and must be considered in camera and in preference to all other pending appeals. (1995, c. 407, s. 1.)

§ 15A-295. Reports concerning intercepted wire, oral, or electronic communications.

In January of each year, the Attorney General of this State must report to the Administrative Office of the United States Court the information required to be filed by section 2519 of Title 18 of the United States Code, as heretofore or hereafter amended, and file a copy of the report with the Administrative Office of the Courts of North Carolina. (1995, c. 407, s. 1.)

§ 15A-296. Recovery of civil damages authorized.

(a) Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this Article, has a civil cause of action against any person who intercepts, discloses, uses, or procures any other person to intercept, disclose, or use such communications, and is entitled to recover from any other person:

(1) Actual damages, but not less than liquidated damages, computed at the rate of one hundred dollars ($100.00) a day for each day of violation or one thousand dollars ($1,000), whichever is higher;

(2) Punitive damages; and

(3) A reasonable attorneys' fee and other litigation costs reasonably incurred.

(b) Good faith reliance on a court order or on a representation made by the Attorney General or a district attorney is a complete defense to any civil or criminal action brought under this Article. (1995, c. 407, s. 1.)

§ 15A-297. Conformity to provisions of federal law.

It is the intent of this Article to conform the requirements of all interceptions of wire, oral, or electronic communications conducted by investigative or law enforcement officers in this State to provisions of Chapter 119 of the United States Code, except where the context indicates a purpose to provide safeguards even more protective of individual privacy and constitutional rights. (1995, c. 407, s. 1.)

§ 15A-298. Subpoena authority.

Pursuant to rules issued by the Attorney General, the Director of the State Bureau of Investigation or his designee may issue an administrative subpoena to a communications common carrier or an electronic communications service to compel production of business records if the records:

(1) Disclose information concerning telephone toll billing

records or subscriber information; and
(2) Are material to an active criminal investigation being conducted by the State Bureau of Investigation. (1995, c. 407, s. 1.)

§§ 15A-299, 15A-300: Reserved for future codification purposes.

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-301. Criminal process generally.

(a) Formal Requirements. —
(1) A record of each criminal process issued in the trial division of the General Court of Justice must be maintained in the office of the clerk.
(2) Criminal process, other than a citation, must be signed and dated by the justice, judge, magistrate, or clerk who issues it. The citation must be signed and dated by the law-enforcement officer who issues it.

(b) To Whom Directed. — Warrants for arrest and orders for arrest must be directed to a particular officer, a class of officers, or a combination thereof, having authority and territorial jurisdiction to execute the process. A criminal summons must be directed to the person summoned to appear and must be delivered to and may be served by any law-enforcement officer having authority and territorial jurisdiction to make an arrest for the offense charged, except that in those instances where the defendant is called into a law-enforcement agency to receive a summons, any employee so designated by the agency's chief executive officer may serve a criminal summons at the agency's office. The citation must be directed to the person cited to appear.

(c) Service. —
(1) A law-enforcement officer or other employee designated as provided in subsection (b) receiving criminal process for service or execution must note thereon the date of its receipt. Upon execution or service, a copy of the process must be delivered to the person arrested or served.
(2) A corporation may be served with criminal summons as provided in G.S. 15A-773.

(d) Return. —
(1) The officer or other employee designated as provided in subsection (b) who serves or executes criminal process must enter the date of the service or execution on the process and return it to the clerk of court in the county in which issued.
(2) If criminal process is not served or executed within a number of days indicated below, it must be returned to the clerk of court in the county in which it was issued, with a reason for the failure of service or execution noted thereon.

a. Warrant for arrest — 180 days.
b. Order for arrest — 180 days.
c. Criminal summons — 90 days or the date the defendant is directed to appear, whichever is earlier.

(3) Failure to return the process to the clerk does not invalidate the process, nor does it invalidate service or execution made after the period specified in subdivision (2).

(4) The clerk to which return is made may redeliver the process to a law-enforcement officer or other employee designated as provided in subsection (b) for further attempts at service. If the process is a criminal summons, he may reissue it only upon endorsement of a new designated time and date of appearance.

(e) Copies to Be Made by Clerk. —

(1) The clerk may make a certified copy of any criminal process filed in his office pursuant to subsection (a) when the original process has been lost or when the process has been returned pursuant to subdivision (d)(2). The copy may be executed as effectively as the original process whether or not the original has been redelivered as provided in G.S. 15A-301(d)(4).

(2) When criminal process is returned to the clerk pursuant to subdivision (d)(1) and it appears that the appropriate venue is in another county, the clerk must make and retain a certified copy of the process and transmit the original process to the clerk in the appropriate county.

(3) Upon request of a defendant, the clerk must make and furnish to him without charge one copy of every criminal process filed against him.

(4) Nothing in this section prevents the making and retention of uncertified copies of process for information purposes under G.S. 15A-401(a)(2) or for any other lawful purpose.

(f) Protection of Process Server. — An officer or other employee designated as provided in subsection (b), and serving process as provided in subsection (b), receiving criminal process which is complete and regular on its face may serve the process in accordance with its terms and need not inquire into its regularity or continued validity, nor does he incur criminal or civil liability for its due service. (1868-9, c. 178, subch. 3, s. 4; Code, s. 1135; Rev., s. 3159; C.S., s. 4525; 1957, c. 346; 1969, c. 44, s. 28; 1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 136, 137; 1979, c. 725, ss. 1-3; 1989, c. 262, s. 3.)

§ 15A-302. Citation.

(a) Definition. — A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges.

(b) When Issued. — An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction.

(c) Contents. — The citation must:

(1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,

(2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,

(3) Identify the officer issuing the citation, and
(4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

(d) Service. — A copy of the citation shall be delivered to the person cited who may sign a receipt on the original which shall thereafter be filed with the clerk by the officer. If the cited person refuses to sign, the officer shall certify delivery of the citation by signing the original, which shall thereafter be filed with the clerk. Failure of the person cited to sign the citation shall not constitute grounds for his arrest or the requirement that he post a bond. When a citation is issued for a parking offense, a copy shall be delivered to the operator of a vehicle who is present at the time of service, or shall be delivered to the registered owner of the vehicle if the operator is not present by affixing a copy of the citation to the vehicle in a conspicuous place.

(e) Dismissal by Prosecutor. — If the prosecutor finds that no crime or infraction is charged in the citation, or that there is insufficient evidence to warrant prosecution, he may dismiss the charge and so notify the person cited. An appropriate entry must be made in the records of the clerk. It is not necessary to enter the dismissal in open court or to obtain consent of the judge.

(f) Citation No Bar to Criminal Summons or Warrant. — If the offense is a misdemeanor, a criminal summons or a warrant may issue notwithstanding the prior issuance of a citation for the same offense.

(g) Preparation of Form. — The form and content of the citation is as prescribed by the Administrative Officer of the Courts. The form of citation used for violation of the motor vehicle laws must contain a notice that the driving privilege of the person cited may be revoked for failure to appear as cited, and must be prepared as provided in G.S. 7A-148(b). (1973, c. 1286, s. 1; 1975, c. 166, ss. 3, 27; 1983, c. 327, s. 4; 1985, c. 385; c. 764, s. 4; 1989, c. 243, s. 1.)

§ 15A-304. Warrant for arrest.

CASE NOTES

Applied in State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993).

Quoted in Howell v. Barker, 684 F. Supp. 132 (E.D.N.C. 1988).

Cited in State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

§ 15A-305. Order for arrest.

CASE NOTES

Cited in Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Article 18.

§§ 15A-306 through 15A-353: Reserved for future codification purposes.

Editor's Note. — Session Laws 1993, c. 539, s. 1248 read: "G.S. 15A-343(b) reads as rewritten:

"(b) A violation of this section is a Class I felony if:

"(1) The violator was released in connection with a felony charge against him; or

"(2) The violator was released under the provisions of G.S. 15A-536."

However, the text set out was that of G.S. 15A-543(b), as amended. The amendment has not been effectuated at the direction of the Revisor of Statutes.

SUBCHAPTER IV. ARREST.

Article 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

(a) Arrest by Officer Pursuant to a Warrant. —

(1) Warrant in Possession of Officer. — An officer having a warrant for arrest in his possession may arrest the person named or described therein at any time and at any place within the officer's territorial jurisdiction.

(2) Warrant Not in Possession of Officer. — An officer who has knowledge that a warrant for arrest has been issued and has not been executed, but who does not have the warrant in his possession, may arrest the person named therein at any time. The officer must inform the person arrested that the warrant has been issued and serve the warrant upon him as soon as possible. This subdivision applies even though the arrest process has been returned to the clerk under G.S. 15A-301.

(b) Arrest by Officer Without a Warrant. —

(1) Offense in Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested; or

c. Has committed a misdemeanor under G.S. 14-72.1, 14-134.3, 20-138.1, or 20-138.2; or

d. Has committed a misdemeanor under G.S. 14-33(a), G.S. 14-33(b)(1), or G.S. 14-33(b)(2) when the offense was committed by a person who is the spouse or former spouse of the alleged victim or by a person with whom the alleged victim is living or has lived as if married.

(3) Repealed by Session Laws 1991, c. 150.

(c) How Arrest Made. —

(1) An arrest is complete when:

a. The person submits to the control of the arresting officer who has indicated his intention to arrest, or

b. The arresting officer, with intent to make an arrest, takes a person into custody by the use of physical force.

(2) Upon making an arrest, a law-enforcement officer must:

a. Identify himself as a law-enforcement officer unless his identity is otherwise apparent,

b. Inform the arrested person that he is under arrest, and

c. As promptly as is reasonable under the circumstances, inform the arrested person of the cause of the arrest, unless the cause appears to be evident.

(d) Use of Force in Arrest. —

(1) Subject to the provisions of subdivision (2), a law-enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary:

a. To prevent the escape from custody or to effect an arrest of a person who he reasonably believes has committed a criminal offense, unless he knows that the arrest is unauthorized; or

b. To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.

(2) A law-enforcement officer is justified in using deadly physical force upon another person for a purpose specified in subdivision (1) of this subsection only when it is or appears to be reasonably necessary thereby:

a. To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force;

b. To effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay; or

c. To prevent the escape of a person from custody imposed upon him as a result of conviction for a felony.

Nothing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

(e) Entry on Private Premises or Vehicle; Use of Force. —

(1) A law-enforcement officer may enter private premises or a vehicle to effect an arrest when:

a. The officer has in his possession a warrant or order for the arrest of a person or is authorized to arrest a person without a warrant or order having been issued,

b. The officer has reasonable cause to believe the person to be arrested is present, and
c. The officer has given, or made reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice would present a clear danger to human life.

(2) The law-enforcement officer may use force to enter the premises or vehicle if he reasonably believes that admittance is being denied or unreasonably delayed, or if he is authorized under subsection (e)(1)c to enter without giving notice of his authority and purpose.

(f) Use of Deadly Weapon or Deadly Force to Resist Arrest. —

(1) A person is not justified in using a deadly weapon or deadly force to resist an arrest by a law-enforcement officer using reasonable force, when the person knows or has reason to know that the officer is a law-enforcement officer and that the officer is effecting or attempting to effect an arrest.

(2) The fact that the arrest was not authorized under this section is no defense to an otherwise valid criminal charge arising out of the use of such deadly weapon or deadly force.

(3) Nothing contained in this subsection (f) shall be construed to excuse or justify the unreasonable or excessive force by an officer in effecting an arrest. Nothing contained in this subsection (f) shall be construed to bar or limit any civil action arising out of an arrest not authorized by this Article. (1868-9, c. 178, subch. 1, ss. 3, 5; Code, ss. 1126, 1128; Rev., ss. 3178, 3180; C.S., ss. 4544, 4546; 1955, c. 58; 1973, c. 1286, s. 1; 1979, c. 561, s. 3; c. 725, s. 4; 1983, c. 762, s. 1; 1985, c. 548; 1991, c. 150, s. 1; 1995, c. 506, s. 10.)

Editor's Note. — Section 14-33(b)(1) and (b)(2), referred to in this section was repealed by Session Laws 1995, c. 507, s. 19.5(b).

Session Laws 1995, c. 506, which amended this section, in s. 15 provides that the act shall not be construed to abate or affect any charges or violations occurring before September 15, 1995.

Effect of Amendments. — The 1995 amendment, effective September 15, 1995, and applicable to offenses committed on or after that date and to limited driving privileges issued after that date, substituted "G.S. 14-72.1, 14-134.3, 20-138.1, or 20-138.2" for "G.S. 14-72.1 or G.S. 14-134.3" in subdivision (b)(2)c.

Legal Periodicals. —

For article, "Litigating Police Misconduct Claims in North Carolina," see 19 N.C. Cent. L.J. 113 (1991).

CASE NOTES

I. General Consideration.
III. Arrest Without Warrant.
  A. In General.
  B. Illustrative Cases.
    1. Offense in Presence of Officer.
V. Entry on Premises.

I. GENERAL CONSIDERATION.

For purposes of a false arrest tort action under State law, the existence of legal justification for a deprivation of liberty is determined in accordance with this section; thus, it is possible, in some instances, for an arrest to be constitutionally valid and yet illegal under State law. Myrick v. Cooley, 91 N.C. App. 209, 371 S.E.2d 492, petition denied as to additional issues, 323 N.C. 477, 373 S.E.2d 865 (1988).

Conviction Establishes Existence of Probable Cause. — In the absence of a showing that the district court's conviction of the defendant for disorderly conduct and resisting arrest was obtained improperly, the conviction establishes, as a matter of law, the existence of probable cause for his arrest and defeated both his federal and State claims for false arrest or imprisonment, even though on appeal to the superior court the disorderly conduct and resisting arrest charges were dismissed at the close of the State's evidence. Myrick v. Cooley, 91 N.C. App. 209, 371 S.E.2d 492, petition denied as to additional issues, 323 N.C. 477, 373 S.E.2d 865 (1988).

Applied in State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990); State v. Mills, 104 N.C. App. 724, 411 S.E.2d 193 (1991); State v. Trapp, 110 N.C. App. 584, 430 S.E.2d 484 (1993); Marlowe v. Piner, 119 N.C. App. 125, 458 S.E.2d 220 (1995).

Quoted in State v. Swift, 105 N.C. App. 550, 414 S.E.2d 65 (1992).

Stated in State v. Medlin, 333 N.C. 280, 426 S.E.2d 402 (1993).

Cited in State v. Leak, 90 N.C. App. 351, 368 S.E.2d 430 (1988); State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992); State v. Greene, 332 N.C. 565, 422 S.E.2d 730 (1992).

III. ARREST WITHOUT WARRANT.

A. In General.

"Probable Cause" Defined, etc. — In accord with second paragraph in the main volume. See State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988); State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Existence of probable cause, etc. —

In accord with the main volume. See State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

B. Illustrative Cases.

1. Offense in Presence of Officer.

Misdemeanor. — In contrast to the rule for searches, police generally need not obtain a warrant before arresting a person in a public place; an officer may make a warrantless arrest for a misdemeanor committed in his or her presence. State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994).

Driving Motor Vehicles, etc. — Before making the stop of a vehicle the arresting officer noticed defendant weaving back and forth and once running off the highway. After he made the stop, the officer noticed that defendant's eyes were extremely red and glassy and that he appeared to be in a daze. He stated that defendant moved sort of slowly and appeared to be nervous and in the officer's opinion he was not normal. Finally, the officer testified that he detected a moderate odor of alcohol about his breath. As a result probable cause existed for placing defendant under arrest for driving while impaired. State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

Use of Body-Bug Transmitter. — Knowledge of an offense acquired through officer's sense of hearing as he monitored conversations and a drug transaction through body-bug transmitter worn by informant held to have occurred in presence of the officer. State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Where detective had given informant money to make drug purchase from defendant, he listened to the drug purchase transaction take place through the use of a body-bug transmitter worn by informant, and immediately following the transaction, informant delivered the drugs to the officer and gave him a detailed account of the transaction, the officer had probable cause to believe that defendant had committed a felony. State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

V. ENTRY ON PREMISES.

Entry Held Lawful. — There was sufficient compliance with the requirements that entrance be demanded and denied before a police officer can forcibly enter a dwelling for the purpose of making an arrest, where the officer knocked, identified himself twice, heard a lot of scrambling and running noises coming from within the dwelling, and received no reply before he forcibly opened the door. State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Evidence in Plain View Admissible. — In a prosecution for first degree rape and first degree kidnapping, evidence was properly admitted, where officers possessing valid arrest warrants were permitted to enter trailer by defendant's brother, the officers had reason to suspect that defendant was present in the trailer, the officers informed defendant's brother of their purpose, and the items seized and admitted into evidence were seen in plain view. State v. Hill, 116 N.C. App. 573, 449 S.E.2d 573, cert. denied, 338 N.C. 670, 453 S.E.2d 183 (1994).

Knock and Announce Requirement. — The requirements of subsection (e) were satisfied where plaintiff was well aware of police officer's identities and their reason for being at her house; defendants were uniformed Highway Patrolmen who had arrived on the scene in patrol cars and who had been involved in an altercation with plaintiff minutes before the alleged unlawful entry; and, moreover, defendants were about to apprehend plaintiff as she entered the kitchen and attempted to close the door; in such a case, compliance with the knock and announce requirement was not required. Lee v. Greene, 114 N.C. App. 580, 442 S.E.2d 547 (1994).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

(a) Territorial Jurisdiction of State Officers. — Law-enforcement officers of the State of North Carolina may arrest persons at any place within the State.

(b) Territorial Jurisdiction of County and City Officers. — Law-enforcement officers of cities and counties may arrest persons within their particular cities or counties and on any property and rights-of-way owned by the city or county outside its limits.

(c) City Officers, Outside Territory. — Law-enforcement officers of cities may arrest persons at any point which is one mile or less from the nearest point in the boundary of such city. Law enforcement officers of cities may transport a person in custody to or from any place within the State for the purpose of that person attending criminal court proceedings. While engaged in the transportation of persons for the purpose of attending criminal court proceedings, law enforcement officers of cities may arrest persons at any place within the State for offenses occurring in connection with and incident to the transportation of persons in custody.

(d) County and City Officers, Immediate and Continuous Flight. — Law-enforcement officers of cities and counties may arrest persons outside the territory described in subsections (b) and (c) when the person arrested has committed a criminal offense within that territory, for which the officer could have arrested the person within that territory, and the arrest is made during such person's immediate and continuous flight from that territory.

(e) County Officers, Outside Territory, for Felonies. — Law-enforcement officers of counties may arrest persons at any place in the State of North Carolina when the arrest is based upon a felony committed within the territory described in subsection (b).

(f) Campus Police Officers, Immediate and Continuous Flight. — A campus police officer: (i) appointed by a campus law-enforcement agency established pursuant to G.S. 116-40.5(a); or (ii) commissioned by the Attorney General pursuant to Chapter 74E and employed by a college or university which is licensed, or exempted from licensure, by G.S. 116-15 may arrest a person outside his territorial jurisdiction when the person arrested has committed a criminal offense within the territorial jurisdiction, for which the officer could have arrested the person within that territory, and the arrest is made during such person's immediate and continuous flight from that territory. (1935, c. 204; 1973, c. 1286, s. 1; 1987, c. 671, s.

3; 1989, c. 518, s. 4; 1991 (Reg. Sess., 1992), c. 1043, s. 3; 1995, c. 206, s. 1.)

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, added the last two sentences in subsection (c).

§ 15A-404. Detention of offenders by private persons.

CASE NOTES

Blocking Exit. — Where plaintiff was restrained for a very brief time and the restraint consisted of having her exit from office temporarily blocked, and no defendant used actual force to keep her in office, the simple act of standing in front of a door for a few seconds was not an unreasonable detention. Caldwell v. Linker, 901 F. Supp. 1010 (M.D.N.C. 1995).

Illustrative Cases. — Individual who was shot attempting to stop defendants from leaving scene had cause to believe the felony of burglary was being committed in his presence, where evidence showed that at the time of his arrival he knew only that his daughter had telephoned at approximately 2:15 a.m. to report that someone was breaking into her home and that the call was then cut off, that he observed a strange vehicle in the driveway and two individuals in the process of removing certain components of an entertainment center from the home, and that the two individuals ran from the dwelling. State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995).

Where community college president requested that instructor return the keys belonging to college and she refused, this refusal was sufficient to justify president in temporarily restraining plaintiff and attempting to have the college's property returned. Caldwell v. Linker, 901 F. Supp. 1010 (M.D.N.C. 1995).

Cited in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

§ 15A-405. Assistance to law-enforcement officers by private persons to effect arrest or prevent escape; benefits for private persons.

(a) Assistance upon Request; Authority. — Private persons may assist law-enforcement officers in effecting arrests and preventing escapes from custody when requested to do so by the officer. When so requested, a private person has the same authority to effect an arrest or prevent escape from custody as the officer making the request. He does not incur civil or criminal liability for an invalid arrest unless he knows the arrest to be invalid. Nothing in this subsection constitutes justification for willful, malicious or criminally negligent conduct by such person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force.

(b) Benefits to Private Persons. — A private person assisting a law-enforcement officer pursuant to subsection (a) is:

(1) Repealed by Session Laws 1989, c. 290, s. 1, effective June 12, 1989.

(2) Entitled to the same benefits as a "law-enforcement officer" as that term is defined in G.S. 143-166.2(d) (Law-Enforcement Officers', Firemen's and Rescue Squad Workers' Death Benefit Act); and

(3) To be treated as an employee of the employer of the law-enforcement officer within the meaning of G.S. 97-2(2) (Workers' Compensation Act).

The Governor and the Council of State are authorized to allocate funds from the Contingency and Emergency Fund for the payment of benefits under subdivision (3) when no other source is available for the payment of such benefits and when they determine that such allocation is necessary and appropriate. (1868-9, c. 178, subch. 1, s. 2; Code, s. 1125; Rev., s. 3181; C.S., s. 4547; 1973, c. 1286, s. 1; 1979, c. 714, s. 2; 1989, c. 290, s. 1.)

§ 15A-406. Assistance by federal officers.

(a) For purposes of this section, "federal law enforcement officer" means any of the following persons who are employed as full-time law enforcement officers by the federal government and who are authorized to carry firearms in the performance of their duties:

(1) United States Secret Service special agents;
(2) Federal Bureau of Investigation special agents;
(3) Bureau of Alcohol, Tobacco and Firearms special agents;
(4) United States Naval Investigative Service special agents;
(5) Drug Enforcement Administration special agents;
(6) United States Customs Service officers;
(7) United States Postal Service inspectors;
(8) Internal Revenue Service special agents;
(9) United States Marshals Service marshals and deputies;
(10) United States Forest Service officers;
(11) National Park Service officers;
(12) United States Fish and Wildlife Service officers; and
(13) Immigration and Naturalization Service officers.

(b) A federal law enforcement officer is authorized under the following circumstances to enforce criminal laws anywhere within the State:

(1) If the federal law enforcement officer is asked by the head of a state or local law enforcement agency, or his designee, to provide temporary assistance and the request is within the scope of the state or local law enforcement agency's subject matter and territorial jurisdiction; or

(2) If the federal law enforcement officer is asked by a state or local law enforcement officer to provide temporary assistance when at the time of the request the state or local law enforcement officer is acting within the scope of his subject matter and territorial jurisdiction.

(c) A federal law enforcement officer shall have the same powers as those invested by statute or common law in a North Carolina law enforcement officer, and shall have the same legal immunity from personal civil liability as a North Carolina law enforcement officer, while acting pursuant to this section.

(d) A federal law enforcement officer who acts pursuant to this section shall not be considered an officer, employee, or agent of any state or local law enforcement agency.

(e) For purposes of the Federal Tort Claims Act, a federal law enforcement officer acts within the scope of his office or employment while acting pursuant to this section.

(f) Nothing in this section shall be construed to expand the authority of federal officers to initiate or conduct an independent investigation into violation of North Carolina law. (1991, c. 262, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 8; 1993 (Reg. Sess., 1994), c. 571, s. 1.)

Editor's Note. — Session Laws 1991, c. 262, s. 2, made this section effective upon ratification and applicable to actions by federal law enforcement officers occurring on or after that date. The act was ratified June 11, 1991.

§§ 15A-407 through 15A-409: Reserved for future codification purposes.

ARTICLE 21.

§§ 15A-410 through 15A-453: Reserved for future codification purposes.

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

CASE NOTES

I. General Consideration.
II. Taking Person Before Judiciary Official.

I. GENERAL CONSIDERATION.

Where any delay in arrest was at the request of defendant's counsel and was unquestionably not caused by anything the deputies did, and after the arrest warrant was served, there was no delay in presenting defendant before the magistrate, there was no "unnecessary delay" and therefore no breach of duty by the arresting officer. Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

Delay Not Error Since Confession Not Result of Violation. — Where there was nothing in the record that showed that the defendant's confession resulted from any delay in taking him before a magistrate, any unnecessary delay, if any occurred, in violation of this section would not result in error, since a confession must be suppressed only if the confession was obtained as a result of a violation. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

Cited in State v. Jones, 112 N.C. App. 337, 435 S.E.2d 574 (1993); State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

II. TAKING PERSON BEFORE JUDICIARY OFFICIAL.

"Unnecessary Delay" under Subdivision (2). — Homicide defendant's clothes were not taken as a result of an unnecessarily long delay in his appearance before a magistrate where he was taken before a magistrate within 90 minutes of his arrest and his clothing was taken within a few hours thereafter. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Delay Was Not Unnecessary Where Defendant Advised of His Rights. — Thirteen-hour delay between the time defendant was taken into custody and the time he was taken before a magistrate was not an unnecessary delay where police officers interrogated the defendant for ten hours before he confessed; the officers fully advised him of his constitutional rights before the interrogation began and if he had been taken before a magistrate, he would have been advised of those same rights. The court could not hold that the defendant would have exercised his right to remain silent if he had been warned of this right by a magistrate rather than the officer. State v. Littlejohn, 340 N.C. 750, 459 S.E.2d 629 (1995).

§ 15A-502. Photographs and fingerprints.

(a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:

(1) Arrested or committed to a detention facility, or
(2) Committed to imprisonment upon conviction of a crime, or
(3) Convicted of a felony.

It shall be the duty of the arresting law-enforcement agency to cause a person charged with the commission of a felony to be fingerprinted and to forward those fingerprints to the State Bureau of Investigation.

(b) This section does not authorize the taking of photographs or fingerprints when the offense charged is a Class 2 or 3 misdemeanor under Chapter 20 of the General Statutes, "Motor Vehicles."

(c) This section does not authorize the taking of photographs or fingerprints of a juvenile alleged to be delinquent except under G.S. 7A-596 through 7A-601 and 7A-603.

(d) This section does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.

(e) Fingerprints or photographs taken pursuant to subsection (a) may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies. (1973, c. 1286, s. 1; 1977, c. 711, s. 22; 1979, c. 850; 1981, c. 862, s. 3; 1993, c. 539, s. 298; 1994, Ex. Sess., c. 24, s. 14(c); 1996, 2nd Ex. Sess., c. 18, s. 23.2(b).)

Editor's Note. —

Session Laws 1993, c. 539, s. 298, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective October 1, 1996, and applicable to offenses committed on or after that date, in subsection (c) inserted "alleged to be delinquent," and inserted "and 7A-603."

§ 15A-505. Notification of minor's parent.

(a) A law-enforcement officer who charges a minor with a criminal offense shall notify the minor's parent or guardian of the charge, as soon as practicable, in person or by telephone. If the minor is taken into custody, the law enforcement officer or the officer's immediate superior shall notify a parent or guardian in writing that the minor is in custody within 24 hours of the minor's arrest. If the parent or guardian of the minor cannot be found, then the officer or the officer's immediate superior shall notify the minor's next-of-kin of the minor's arrest as soon as practicable.

(b) The notification provided for by subsection (a) of this section shall not be required if:

(1) The minor is emancipated;

(2) The minor is not taken into custody and has been charged with a motor vehicle moving violation for which three or fewer points are assessed under G.S. 20-16(c), except an offense involving impaired driving, as defined in G.S. 20-4.01(24a); or

(3) The minor has been charged with a motor vehicle offense that is not a moving violation. (1983, c. 681, s. 1; 1994, Ex. Sess., c. 26, s. 1.)

Editor's Note. — Session Laws 1994, Extra Session, c. 26, s. 1, which amended this section, was effective May 1, 1994, and applicable to offenses committed on or after that date.

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

CASE NOTES

Deputy sheriffs may not conduct bail hearings nor may they decide on the granting or denying of bail under North Carolina law; that authority is vested in a judicial officer. Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

Where any delay in arrest was at the request of defendant's counsel and was unquestionably not caused by anything the deputies did, and after the arrest warrant was served, there was no delay in presenting defendant before the magistrate, there was no "unnecessary delay" and therefore no breach of duty by the arresting officer. Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

Where defendant contended that the four and one-half hour delay in taking him before a judicial official after service of warrants was a coercive factor which rendered his confession involuntary, but he did not show any causal connection between the confession and the delay, no constitutional provision required exclusion of his statement on this ground. State v. Leak, 90 N.C. App. 351, 368 S.E.2d 430 (1988).

Failure to Advise Defendants of Their Rights. — Defendants made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief where the evidence showed that magistrates failed to advise defendants of their rights under subsection (b) of this section, §§ 15A-533(b) and 15A-534(c) and deprived defendants of their rights to secure their liberty for a significant time during a critical period. State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Stated in State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992).

ARTICLE 26.

Bail.

§ 15A-531. Definitions.

As used in this Article the following definitions apply unless the context clearly requires otherwise:

(1) Bail Bond. — An undertaking by the principal to appear in court as required upon penalty of forfeiting bail to the State of North Carolina in a stated amount. Bail bonds include an unsecured appearance bond, an appearance bond secured by a cash deposit of the full amount of the bond, an appearance bond secured by a mortgage pursuant to G.S. 58-74-5, and an appearance bond secured by at least one solvent surety. A bail bond for which the surety is a surety bondsman, as defined in G.S. 58-71-1, acting on behalf of an insurer shall be considered the same as a cash deposit for all purposes in this Article. A bail bond signed by a professional bondsman who is not a surety bondsman, as defined in G.S. 58-71-1, shall not be considered the same as a cash deposit under this Article. Cash bonds set in child support contempt proceedings shall not be satisfied in any manner other than the deposit of cash.

(2) Obligor. — A principal or a surety on a bail bond.

(3) Principal. — A defendant or material witness obligated to appear in court as required upon penalty of forfeiting bail under a bail bond.

(4) Surety. — One who, with the principal, is liable for the amount of the bail bond upon forfeiture of bail. (1973, c. 1286, s. 1; 1975, c. 166, s. 12; 1995, c. 290, s. 1; c. 503, s. 1.)

Effect of Amendments. — Session Laws 1995, c. 290, s. 1, effective June 19, 1995, added the last sentence in subdivision (1).

Session Laws 1995, c. 503, s. 1, effective July 28, 1995, in subdivision (1), in the third sentence substituted “bail bond” for “surety bond”, and added “for which the surety is a surety bondsman, as defined in G.S. 58-71-1, acting on behalf of an insurer”, and added the fourth and last sentences.

CASE NOTES

Quoted in State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

§ 15A-532. Persons authorized to determine conditions for release; use of two-way audio and video transmission.

(a) Judicial officials may determine conditions for release of persons brought before them or as provided in subsection (b) of this section, in accordance with this Article.

(b) Any proceeding under this Article to determine, modify, or revoke conditions of pretrial release in a noncapital case may be conducted by an audio and video transmission between the judicial official and the defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding. Upon motion of the defendant, the court may not use an audio and video transmission.

(c) Prior to the use of audio and video transmission pursuant to subsection (b) of this section, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts. (1973, c. 1286, s. 1; 1993, c. 30, s. 1.)

§ 15A-533. Right to pretrial release in capital and noncapital cases.

CASE NOTES

Failure to Advise Defendants of Their Rights. — Defendants made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief where the evidence showed that magistrates failed to advise defendants of their rights under § 15A-511(b), subsection (b) of this section and § 15A-534(c) and deprived defendants of their rights to secure their liberty for a significant time during a critical period. State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Applied in State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992).

Quoted in State v. O'Neal, 108 N.C. App. 661, 424 S.E.2d 680 (1993).

§ 15A-534. Procedure for determining conditions of pretrial release.

(a) In determining conditions of pretrial release a judicial official must impose one of the following conditions:

(1) Release the defendant on his written promise to appear.
(2) Release the defendant upon his execution of an unsecured appearance bond in an amount specified by the judicial official.
(3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.
(4) Require the execution of an appearance bond in a specified amount secured by a cash deposit of the full amount of the bond, by a mortgage pursuant to G.S. 58-74-5, or by at least one solvent surety.

If condition (3) is imposed, however, the defendant may elect to execute an appearance bond under subdivision (4). The judicial official may also place restrictions on the travel, associations, conduct, or place of abode of the defendant as conditions of pretrial release.

(b) The judicial official in granting pretrial release must impose condition (1), (2), or (3) in subsection (a) above unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the judicial official must then impose condition (4) in subsection (a) above instead of condition (1), (2), or (3), and must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a).

(c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

(d) The judicial official authorizing pretrial release under this section must issue an appropriate order containing a statement of the conditions imposed, if any; inform the defendant in writing of the penalties applicable to violations of the conditions of his release; and advise him that his arrest will be ordered immediately upon any violation. The order of release must be filed with the clerk and a copy given the defendant.

(e) A magistrate or a clerk may modify his pretrial release order at any time prior to the first appearance before the district court judge. At or after such first appearance, except when the conditions of pretrial release have been reviewed by the superior court pursuant to G.S. 15A-539, a district court judge may modify a pretrial release order of the magistrate or clerk or any pretrial release order entered by him at any time prior to:

(1) In a misdemeanor case tried in the district court, the noting of an appeal; and

(2) In a case in the original trial jurisdiction of the superior court, the binding of the defendant over to superior court after the holding, or waiver, of a probable-cause hearing.

After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk, or district court judge, or any such order entered by him, at any time prior to the time set out in G.S. 15A-536(a).

(f) For good cause shown any judge may at any time revoke an order of pretrial release. Upon application of any defendant whose order of pretrial release has been revoked, the judge must set new conditions of pretrial release in accordance with this Article.

(g) In imposing conditions of pretrial release and in modifying and revoking orders of release under this section, the judicial official must take into account all evidence available to him which he considers reliable and is not strictly bound by the rules of evidence applicable to criminal trials.

(h) A bail bond posted pursuant to this section is effective and binding upon the obligor throughout all stages of the proceeding in the trial division of the General Court of Justice until the entry of judgment in the district court from which no appeal is taken or the entry of judgment in the superior court. The obligation of an obligor, however, is terminated at an earlier time if:

(1) A judge authorized to do so releases the obligor from his bond; or

(2) The principal is surrendered by a surety in accordance with G.S. 15A-540; or

(3) The proceeding is terminated by voluntary dismissal by the State before forfeiture is ordered under G.S. 15A-544(b); or

(4) Prayer for judgment has been continued indefinitely in the district court. (1973, c. 1286, s. 1; 1975, c. 166, s. 13; 1977, 2nd Sess., c. 1134, s. 5; 1987, c. 481, s. 1; 1989, c. 259.)

CASE NOTES

Deputy sheriffs may not conduct bail hearings, nor may they decide on the granting or denying of bail under North Carolina law; that authority is vested in a judicial officer. Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

Failure to Advise Defendants of Their Rights. — Defendants made a sufficient showing of a substantial statutory violation and of the prejudice arising therefrom to warrant relief where the evidence showed that magistrates failed to advise defendants of their rights under §§ 15A-511(b), 15A-533(b) and subsection (c) of this section and deprived defendants of their rights to secure their liberty for a significant time during a critical period. State v. Knoll, 322 N.C. 535, 369 S.E.2d 558 (1988).

Pretrial Assignment to Division of Adult Probation. — The legislature has provided for pretrial assignment of a defendant to the Division of Adult Probation and Parole only upon deferred prosecution, and upon the agreement to assume supervision of the person. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Court Had No Authority to Order Supervision of Defendant. — Superior court had no authority to enter order requiring Division of Adult Probation and Parole, without its consent, to provide supervision of defendant, who had been determined incompetent to stand trial but not subject to involuntary commitment, while in custody of his former wife. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Compliance with Statute Shown. — Where neither the transcript from a pretrial hearing, nor anything else in the record, indicated that the judge did not consider the appropriate factors in either the initial establishment of defendant's bond, in the later modification, or in subsequent refusals to modify, absent some evidence to the contrary from the defendant, it was concluded that the law relating to pretrial release was properly applied to him. State v. O'Neal, 108 N.C. App. 661, 424 S.E.2d 680 (1993).

Substantial Violation of Statute Not Shown. — Where magistrate failed to inquire into defendant's character and mental condition, and proceeded without information regarding his financial resources, length of residence in the community and family ties, (though defendant did inform magistrate that he was married) before he was taken from the magistrate's office to the jail, defendant did not make a sufficient showing of any substantial statutory violation which would warrant dismissal of the charges against him based on a failure to inquire into every individual factor, given all the other information which the magistrate had before her in setting the bond; defendant also failed to show how inquiry into these considerations would have required the magistrate to proceed any differently in setting the conditions of pretrial release. State v. Eliason, 100 N.C. App. 313, 395 S.E.2d 702 (1990).

Applied in State v. Ham, 105 N.C. App. 658, 414 S.E.2d 577 (1992).

Cited in State v. Nicholson, 99 N.C. App. 143, 392 S.E.2d 748 (1990).

§ 15A-534.1. Crimes of domestic violence; bail and pretrial release.

(a) In all cases in which the defendant is charged with assault on or communicating a threat to a spouse or former spouse or a person with whom the defendant lives or has lived as if married, with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50B, Domestic Violence, of the General Statutes, the judicial official who determines the conditions of pretrial release shall be a judge, and the following provisions shall apply in addition to the provisions of G.S. 15A-534:

(1) Upon a determination by the judge that the immediate release of the defendant will pose a danger of injury to the alleged victim or to any other person or is likely to result in intimidation of the alleged victim and upon a determination that the execution of an appearance bond as required by G.S. 15A-534 will not reasonably assure that such injury

or intimidation will not occur, a judge may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release.

(2) A judge may impose the following conditions on pretrial release:

a. That the defendant stay away from the home, school, business or place of employment of the alleged victim;

b. That the defendant refrain from assaulting, beating, molesting, or wounding the alleged victim;

c. That the defendant refrain from removing, damaging or injuring specifically identified property;

d. That the defendant may visit his or her child or children at times and places provided by the terms of any existing order entered by a judge.

The conditions set forth above may be imposed in addition to requiring that the defendant execute a secured appearance bond.

(3) Should the defendant be mentally ill and dangerous to himself or others or a substance abuser and dangerous to himself or others, the provisions of Article 5 of Chapter 122C of the General Statutes shall apply.

(b) A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section. (1979, c. 561, s. 4; 1989, c. 290, s. 2; 1995, c. 527, s. 3.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, added the subsection (a) designation; inserted "the judicial official who determines the conditions of pretrial release shall be a judge, and" toward the end of the introductory language; substituted "judge" for "judicial official" twice in subdivision (a)(1) and once in subdivision (a)(2); and added subsection (b).

§ 15A-534.2. Detention of impaired drivers.

CASE NOTES

Defendant's Rights Not Violated. — Where magistrate correctly imposed pretrial release restriction requiring a sober responsible adult to take custody of defendant pursuant to this section, there was no constitutional violation of defendant's constitutional right to secure witnesses. State v. Bumgarner, 97 N.C. App. 567, 389 S.E.2d 425, cert. denied and appeal dismissed, 326 N.C. 599, 393 S.E.2d 873 (1990).

§ 15A-534.3. Detention for communicable diseases.

If a judicial official conducting an initial appearance or first appearance hearing finds probable cause that an individual was exposed to the defendant in a manner that poses a significant risk of transmission of the AIDS virus or Hepatitis B by such defendant, the judicial official shall order the defendant to be detained for a reasonable period of time, not to exceed 24 hours, for investigation by public health officials and for testing for AIDS virus infection and

Hepatitis B infection if required by public health officials pursuant to G.S. 130A-144 and G.S. 130A-148. (1989, c. 499, s. 1.)

Editor's Note. — Session Laws 1989, c. 499, s. 2 made this section effective October 1, 1989, and applicable to acts occurring on or after that date.

§ 15A-534.4. Sex offenses and crimes of violence against child victims: bail and pretrial release.

In all cases in which the defendant is charged with felonious or misdemeanor child abuse, with taking indecent liberties with a minor in violation of G.S. 14-202.1, with rape or any other sex offense in violation of Article 7A, Chapter 14 of the General Statutes, against a minor victim, with incest with a minor in violation of G.S. 14-178, with kidnapping, abduction, or felonious restraint involving a minor victim, with a violation of G.S. 14-320.1, with assault or any other crime of violence against a minor victim, or with communicating a threat against a minor victim, in addition to the provisions of G.S. 15A-534 a judicial official may impose the following conditions on pretrial release;

(1) That the defendant stay away from the home, temporary residence, school, business, or place of employment of the alleged victim.

(2) That the defendant refrain from communicating or attempting to communicate, directly or indirectly, with the victim, except under circumstances specified in an order entered by a judge with knowledge of the pending charges.

(3) That the defendant refrain from assaulting, beating, intimidating, stalking, threatening, or harming the alleged victim.

The conditions set forth above may be imposed in addition to any other conditions that the judicial official may impose on pretrial release. (1993 (Reg. Sess., 1994), c. 723, s. 5.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 723, s. 7 made this section effective upon ratification. The act was ratified July 7, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 723, which enacted this section, in s. 6 provides: "Nothing in this act obligates the General Assembly to appropriate any funds to implement this act."

Session Laws 1993 (Reg. Sess., 1994), c. 723, ss. 1 through 4 provides that the Administrative Officer of the Courts is to encourage district attorneys to develop and disseminate information about "child friendly" courtroom environments; that the North Carolina Conference of District Attorneys consider setting up a special section for child abuse prosecutors; and that the North Carolina Department of Justice and North Carolina Conference of District Attorneys are encouraged to develop protocols and training for conducting child abuse investigations and criminal prosecution of child abuse and neglect and to develop and disseminate job descriptions and work procedures for law enforcement officers specializing in child abuse criminal investigations and for assistant district attorneys to handle child abuse and neglect cases.

§ 15A-540. Surrender of a principal by a surety; setting new conditions of release.

(a) A surety may surrender his principal to the sheriff of the county in which the principal is bonded to appear or to the sheriff where the defendant was bonded. A surety may arrest his principal for the purpose of returning him to the sheriff. Upon surrender of the principal the sheriff must provide a receipt to the surety, a copy of which must be filed with the clerk. Upon application by the surety after the surrender of the principal, before the forfeiture of bail under G.S. 15A-544(b), the clerk must exonerate him from his bond.

(b) A principal surrendered by his surety is entitled to an immediate hearing on whether he is again entitled to release and, if so, upon what conditions. (1973, c. 1286, s. 1; 1995, c. 290, s. 2.)

Effect of Amendments. — The 1995 amendment, effective June 19, 1995, added "or to the sheriff where the defendant was bonded" in the first sentence of subsection (a).

§ 15A-541. Persons prohibited from becoming surety.

(a) No sheriff, deputy sheriff, other law-enforcement officer, judicial official, attorney, parole officer, probation officer, jailer, assistant jailer, employee of the General Court of Justice, other public employee assigned to duties relating to the administration of criminal justice, or spouse of any such person may in any case become surety on a bail bond for any person other than a member of his immediate family. In addition no person covered by this section may act as agent for any bonding company or professional bondsman. No such person may have an interest, directly or indirectly, in the financial affairs of any firm or corporation whose principal business is acting as bondsman.

(b) A violation of this section is a Class 2 misdemeanor. (1973, c. 1286, s. 1; 1993, c. 539, s. 299; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 299, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 15A-542. False qualification by surety.

(a) No person may sign an appearance bond as surety knowing or having reason to know that he does not own sufficient property over and above his exemption allowed by law to enable him to pay the bond should it be ordered forfeited.

(b) A violation of this section is a Class 2 misdemeanor. (1973, c. 1286, s. 1; 1993, c. 539, s. 300; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 300, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 15A-543. Penalties for failure to appear.

(a) In addition to forfeiture imposed under G.S. 15A-544, any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section.

(b) A violation of this section is a Class I felony if:

(1) The violator was released in connection with a felony charge against him; or

(2) The violator was released under the provisions of G.S. 15A-536.

(c) If, except as provided in subsection (b) above, a violator was released in connection with a misdemeanor charge against him, a violation of this section is a Class 2 misdemeanor. (1973, c. 1286, s. 1; 1983, c. 294, s. 4; 1993, c. 539, s. 301; 1994, Ex. Sess., c. 14, s. 16; c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 1248 read: "G.S. 15A-343 (b) reads as rewritten." However, the text set out was that of G.S. 15A-543(b), as amended. The amendment was not effectuated at the direction of the Revisor of Statutes. Section 16(a) of Chapter 14 of the 1994 Extra Session repealed Session Laws 1993, c. 539, s. 1248, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994).

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 539, s. 301, which amended this section, was effective October 1, 1994, and applicable to offenses occurring on or after that date.

Session Laws 1994, Extra Session, c. 14, s. 16(b), which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

§ 15A-544. Forfeiture.

(a) By entering into a bail bond the obligor submits to the jurisdiction of the court and irrevocably appoints the clerk as the obligor's agent for any proceedings with reference to the bond. The obligor's liability may be enforced on motion without the necessity of an independent action. Each obligor, including the principal, bail agent, and the surety represented by the bail agent, shall enter on the bond the obligor's mailing address, street address, and telephone number for the service of any process required by this section or other provision of law. If the address or telephone number of the obligor changes during the pendency of any proceeding with reference to the bond, it shall be the duty of the obligor to notify the clerk of the obligor's new address and telephone number.

(b) If the principal does not comply with the conditions of the bail bond, the court having jurisdiction must enter an order declaring the bail to be forfeited. If forfeiture is ordered by the court, a copy of the order of forfeiture and notice that judgment will be entered upon the order after 60 days must be served on each obligor. Service is to be made by the clerk mailing by certified mail, return receipt requested, a copy of the order of forfeiture and notice to each obligor at each obligor's address as noted on the bond and note on the original the date of mailing. Service is complete three days after the mailing.

(c) Except as provided in subsection (c1) of this section, at any time within 60 days following the date of service, or on the first presentment of the forfeiture calendar more than 60 days after the date of service, the principal or surety may move the court having jurisdiction of the matter, orally or in writing, to strike the order of forfeiture and recall the notice of forfeiture. If the principal or surety appears and moves within the time allowed following the date of service and satisfies the court that the principal's failure to appear on the date set was impossible or that the principal's failure to appear was without the principal's fault, the order of forfeiture must be set aside. If the principal or surety does not satisfy the court that the principal's appearance on the date set was impossible or that the principal's failure to appear was without the principal's fault, the court must then enter judgment for the State against the principal and surety for the amount of the bail and the cost of the proceeding.

(c1) If the principal does not appear before the court having jurisdiction because the principal is incarcerated in North Carolina and unable to appear before the court, but the surety appears within the time allowed following the date of service and satisfies the court that the principal's appearance on the date set was impossible because the principal was incarcerated in North Carolina, the order of forfeiture must be set aside.

(d) To facilitate the procedure under this section, the clerk in each county shall prepare for both the district and superior court a forfeiture calendar once each month when court is in session. The forfeiture calendar shall list the names of all principals and sureties to whom forfeiture has been ordered more than 60 days previously in the county and as to which judgments of forfeiture against the principal and surety have not been entered or, if entered, not yet satisfied by execution. The forfeiture calendar shall show the amount of the bond ordered forfeited in each case. In addition, the clerk shall place on the forfeiture calendar for hearing all written motions to strike an order of forfeiture filed since the previous forfeiture calendar. It shall be the duty of the district attorney to present the forfeiture calendar to the court, but the attorney for the county school board shall have the right to appear and be heard when the forfeiture calendar is presented. At the district attorney's discretion, the district attorney may appoint the county school board attorney as the district attorney's designee for the presentation of the forfeiture calendar.

(e) At any time within 90 days after entry of the judgment against a principal or surety, the principal or surety, by verified written petition, may request that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment. A copy of the petition must be served upon the attorney for the county school board at least three working days prior to the hearing. The clerk shall place on the forfeiture calendar for hearing all petitions that have been filed during the previous month or since the last forfeiture calendar. The petitioner, the district attorney, and the school board attorney shall be notified of the date, time, and place of the hearing. The petitioner, the district attorney, and the county school board attorney shall be given an opportunity to appear and be heard. If the principal is surrendered by the surety and incarcerated in the State within 90 days of the entry of the judgment, the forfeiture shall be stricken upon the payment of costs. If the principal is incarcerated or served an order for arrest in North Carolina within 90 days of the entry of the judgment and the principal placed on a new bond or released by the court, then the forfeiture shall be stricken upon the payment of costs.

(f) If a judgment has not been remitted within the period provided in subsection (e) above, the clerk must issue execution on the judgment within 30 days, and remit the clear proceeds to the county for use in maintaining free public schools. Any clerk who fails to perform his duty as required in this subsection is subject to a penalty of five hundred dollars ($500.00).

(g) If a levy of execution upon a judgment against an obligor remains unsatisfied for 10 days, the sheriff shall notify the clerks and magistrates in each county in the prosecutorial district and the obligor shall not become surety on any bail bond in the prosecutorial district so long as the judgment remains unsatisfied. Nothing in this subsection makes lawful any act made unlawful by Article 71 of Chapter 58 of the General Statutes.

(h) For extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate. Any person moving for remission of judgment must do so by verified petition, and a copy of the petition must be served upon the attorney for the county school board at least three working days prior to the hearing on the motion. The moving party must notify the attorney for the school board of the time and place of the hearing, and such attorney, if he so desires, must be given an opportunity to appear and be heard. If money has been paid to the county pursuant to execution on a judgment of forfeiture, it must refund to the person entitled the amount of any remission granted under the terms of this subsection upon receipt of a certified copy of the judgment of remission from the clerk. (1868-9, c. 178, subch. 2, s. 10; Code, s. 1225; Rev., s. 3214; C.S., s. 4582; 1973, c. 1286, s. 1; 1987, c. 321; 1987 (Reg. Sess., 1988), c. 1037, s. 57; 1995, c. 290, s. 3; c. 448, s. 1; c. 503, ss. 2, 3.)

Effect of Amendments. — Session Laws 1995, c. 290, s. 3, effective June 19, 1995, substituted "Except as provided in subsection (c1) of this section, if" for "If" in the first sentence of subsection (c); added subsection (c1); and added the second and third sentences of subsection (e).

Session Laws 1995, c. 448, s. 1, effective July 18, 1995, rewrote subsection (d), and deleted the last sentence of subsection (e), regarding remission of the bond if the principal is incarcerated or served an order for arrest, and is placed on a new bond or released by the court.

Session Laws 1995, c. 503, s. 2, effective July 28, 1995, twice inserted "in North Carolina" following "incarcerated" in subsection (c1).

Session Laws 1995, c. 503, s. 3, effective December 1, 1995, rewrote subsections (a), (b), (c), and (e); and in subsection (g) substituted "levy" for "return" and substituted "sheriff shall notify the clerks and magistrates in each county in the prosecutorial district and the obligor shall" for "obliger may".

CASE NOTES

I. General Consideration.
II. Relief from Forfeiture.

I. GENERAL CONSIDERATION.

The purpose of subsection (b) is to regulate the forfeiture of bonds in criminal proceedings and to establish an orderly procedure for forfeiture. State v.

Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Requirements of subsection (b) are not discretionary but mandatory. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Surety Entitled to Notice. — Surety on an appearance bond was an obligor and therefore was entitled to notice as required under subsection (b). State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

II. RELIEF FROM FORFEITURE.

Where surety on appearance bond was not personally served, nor was he mailed a copy of the order of forfeiture or notice, although the sheriff had a record of the surety's address throughout the proceedings, and he had no knowledge of the order of forfeiture and notice, that the judgment was made absolute, or that the matter was transferred to the sheriff's department for execution, the sheriff's department did not comply with the statutory requirements of § 15A-544(b), and the judgment of forfeiture was null and void and would be vacated. State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

Trial Court Erred in Denying Petition for Remission. — Trial court erred in failing to make any findings of fact and conclusions of law in its order denying the petition for remission of a judgment of forfeiture where petitioner-surety submitted affidavits and some 20 pages of exhibits detailing the time, effort and expense its agent(s) incurred in finding, arresting and returning the defendant to the proper authorities; judge's observation that the school board needed the funds more than the surety did not fulfill the required test as to whether "extraordinary cause" was shown. State v. Lanier, 93 N.C. App. 779, 379 S.E.2d 109 (1989).

Applied in State v. Bailey, 93 N.C. App. 721, 379 S.E.2d 266 (1989).

§ 15A-547.1. Remit bail bond if defendant sentenced to community or intermediate punishment.

If a defendant is convicted and sentenced to community punishment or intermediate punishment and no appeal is pending, then the court shall remit the bail bond to the obligor in accordance with the provisions of this Article and shall not require that the bail bond continue to be posted while the defendant serves his or her sentence. (1995, c. 290, s. 4.)

Editor's Note. — Session Laws 1995, c. 290, s. 5, made this section effective upon ratification. The Act was ratified June 19, 1995.

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court; use of two-way audio and video transmission.

(a) Any defendant charged in a magistrate's order under G.S. 15A-511 or criminal process under Article 17 of this Chapter, Criminal Process, with a crime in the original jurisdiction of the superior court must be brought before a district court judge in the district court district as defined in G.S. 7A-133 in which the crime is charged to have been committed. This first appearance before a district court judge is not a critical stage of the proceedings against the defendant.

(a1) A first appearance in a noncapital case may be conducted by an audio and video transmission between the judge and the defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding.

(a2) Prior to the use of audio and video transmission pursuant to subsection (a1) of this section, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge for a judicial district or set of districts and approved by the Administrative Office of the Courts.

(b) When a district court judge conducts an initial appearance as provided in G.S. 15A-511, he may consolidate those proceedings and the proceedings under this Article.

(c) Unless the defendant is released pursuant to Article 26 of this Chapter, Bail, first appearance before a district court judge must be held within 96 hours after the defendant is taken into custody or at the first regular session of the district court in the county, whichever occurs first. If the defendant is not taken into custody, or is released pursuant to Article 26 of this Chapter, Bail, within 96 hours after being taken into custody, first appearance must be held at the next session of district court held in the county. This subsection does not apply to a defendant whose first appearance before a district court judge has been set in a criminal summons pursuant to G.S. 15A-303(d).

(d) Upon motion of the defendant, the first appearance before a district court judge may be continued to a time certain. The defendant may not waive the holding of the first appearance before a district court judge but he need not appear personally if he is represented by counsel at the proceeding.

(e) The clerk of the superior court in the county in which the defendant is taken into custody may conduct a first appearance as provided in this Article if a district court judge is not available in the county within 96 hours after the defendant is taken into custody. The clerk, in conducting a first appearance, shall proceed under this Article as would a district court judge. (1973, c. 1286, s. 1; 1975, 2nd Sess., c. 983, ss. 139, 140; 1979, c. 651; 1987 (Reg. Sess., 1988), c. 1037, s. 58; 1993, c. 30, s. 2.)

Editor's Note. — Session Laws 1993, c. 30, s. 2, which amended this section, became effective April 22, 1993 and applied to proceedings occurring on or after that date.

CASE NOTES

Right to Counsel Attached During First Appearance. — Where defendant in a murder case made his first appearance within 96 hours of when he was taken into custody, although the initial appearance itself was not a critical stage of criminal judicial proceedings at which a defendant was entitled to counsel, defendant's Sixth Amendment right to counsel attached during his first appearance when the state's position against him solidified as to the murder charges and counsel was appointed. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

§ 15A-603. Assuring defendant's right to counsel.

CASE NOTES

Cited in State v. Brown, 325 N.C. 427, 383 S.E.2d 910 (1989).

§ 15A-606. Demand or waiver of probable-cause hearing.

CASE NOTES

Denial of Motion Upheld. — Where there was no evidence in the record to support a finding of prejudicial error other than the passage of time following defendant's arrest and defendant did not explain how he was prejudiced by this passage of time, there was no prejudicial error in the denial of defendant's motions for a probable cause hearing. State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

ARTICLE 30.

Probable-Cause Hearing.

§ 15A-612. Disposition of charge on probable-cause hearing.

CASE NOTES

Quoted in State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994).

§ 15A-615. Testing of certain persons for sexually transmitted infections.

(a) After a finding of probable cause pursuant to the provisions of Article 30 of Chapter 15A of the General Statutes or indictment for an offense that involves nonconsensual vaginal, anal, or oral intercourse, an offense that involves vaginal, anal, or oral intercourse with a child 12 years old or less, or an offense under G.S. 14-202.1 that involves vaginal, anal, or oral intercourse with a child less than 16 years old, the victim or the parent, guardian, or guardian ad litem of a minor victim may request that a defendant be tested for the following sexually transmitted infections:

(1) Chlamydia;
(2) Gonorrhea;
(3) Hepatitis B;
(3a) Herpes;
(4) HIV; and
(5) Syphilis.

In the case of herpes, the defendant, pursuant to the provisions of this section, shall be examined for oral and genital herpetic lesions and, if a suggestive but nondiagnostic lesion is present, a culture for herpes shall be performed.

(b) Upon a request under subsection (a) of this section, the district attorney shall petition the court on behalf of the victim for an order requiring the defendant to be tested. Upon finding that there is probable cause to believe that the alleged sexual contact involved in the offense would pose a significant risk of transmission of a sexually transmitted infection listed in subsection (a) of this section, the court shall order the defendant to submit to testing for these infections.

(c) If the defendant is in the custody of the Department of Correction, the defendant shall be tested by the Department of Correction. If the defendant is not in the custody of the Department of Correction, the defendant shall be tested by the local health department. The Department of Correction shall inform the local health director of all test results. The local health director shall ensure that the victim is informed of the results of the tests and counseled appropriately. The agency conducting the tests shall inform the defendant of the results of the tests and ensure that the defendant is counseled appropriately. The results of the tests shall not be admissible as evidence in any criminal proceeding. (1993, c. 489, s. 1; 1994, Ex. Sess., c. 8, s. 1.)

Editor's Note. — Session Laws 1993, c. 489, s. 2 made this section effective October 1, 1993, and applicable to offenses occurring on or after that date.

The subdivisions in subsection (a) containing "Herpes", "HIV; and", and "Syphilis" have been renumbered at the direction of the Revisor of Statutes.

Session Laws 1994, Extra Session, c. 8, s. 1, which amended this section, was effective January 1, 1995, and applicable to offenses occurring on or after that date.

§§ 15A-616 through 15A-620: Reserved for future codification purposes.

Article 31.

The Grand Jury and Its Proceedings.

§ 15A-621. "Grand jury" defined.

CASE NOTES

Grand Jury Transcripts. — Federal courts will not require North Carolina Superior Courts to have grand jury transcripts produced to defendants; to do so would be to act as a state appeals court and reverse an order by the Superior Court and to intrude into what is a statutorily defined part of the state court. Shell v. Wall, 760 F. Supp. 545 (W.D.N.C. 1991).

§ 15A-622. Formation and organization of grand juries; other preliminary matters.

(a) The mode of selecting grand jurors and of drawing and impaneling grand jurors is governed by this Article and Chapter 9 of the General Statutes, Jurors. Challenges to the panel from which grand jurors were drawn are governed by the procedure in G.S. 15A-1211.

(b) To impanel a new grand jury, the presiding judge must direct that the names of all persons returned as jurors be separately placed in a container. The clerk must draw out the names of 18 persons to serve as grand jurors. Of these 18, the first nine drawn serve until the first session of court at which criminal cases are heard held in the county after the following January 1, and thereafter until their replacements are selected and sworn. The next nine serve until the first session of court at which criminal cases are heard held in the county after the following July 1, and thereafter until their replacements are selected and sworn. If this formula results in any term likely to be shorter than two months or longer than 15 months, the presiding judge impaneling the grand jury may modify the terms. Thereafter, beginning with the first session of superior court at which criminal cases are heard held in the county following January 1 and July 1 of each year, nine new grand jurors must be selected in the manner provided above to replace the jurors whose terms have expired. All new grand jurors so selected serve until the first session of court at which criminal cases are heard held after January 1 or July 1 which most nearly results in a 12-month term, and thereafter until their replacements are selected and sworn. If a vacancy occurs in the membership of the grand jury, the superior court judge next convening the jury or next holding a session of court at which criminal cases are heard in the county may order that a new juror be drawn in the manner provided above to fill the vacancy.

The senior resident superior court judge of the district may impanel a second grand jury in any county of the district to serve concurrently with the first. The second grand jury shall be impaneled as provided in the first paragraph of this subsection. The court shall continue to have two grand juries until the senior resident superior court judge orders the second grand jury to terminate.

In any county the senior resident superior court judge, if he finds that grand jury service is placing a disproportionate burden on grand jurors and their employers, may fix the term of service of a grand juror at six months rather than 12 months. In doing so, he shall prescribe procedures, consistent with this section, for replacement of half of the jurors of the grand jury or grand juries approximately every three months.

(c) Neither the grand jury panel nor any individual grand juror may be challenged, but a superior court judge may:

(1) At any time before new grand jurors are sworn, discharge them, or discharge the grand jury, and cause new grand jurors or a new grand jury to be drawn if he finds that jurors have not been selected in accordance with law or that the grand jury is illegally constituted; or

(2) At any time after a grand juror is drawn, refuse to swear him, or discharge him after he has been sworn, upon a finding that he is disqualified from service, incapable of performing his duties, or guilty of misconduct in the performance of his duties so as to impair the proper functioning of the grand jury.

(d) The presiding judge may excuse a grand juror from service of the balance of his term, upon his own motion or upon the juror's request for good cause shown. The foreman may excuse individual jurors from attending particular sessions of the grand jury, except that he may not excuse more than two jurors for any one session.

(e) After the impaneling of a new grand jury, or the impaneling of nine new jurors under the terms of this section, the presiding judge must appoint one of the grand jurors as foreman and may appoint another to act as foreman during any absence or disability of the foreman. Unless removed for cause by a superior court judge, the foreman serves until his successor is appointed and sworn.

(f) The foreman and other new grand jurors must take the oath prescribed in G.S. 11-11. After new grand jurors have been sworn, the presiding judge may give the grand jurors written or oral instructions relating to the performance of their duties. At subsequent sessions of court, the presiding judge is not required to give any additional instructions to the grand jurors.

(g) At any time when a grand jury is in recess, a superior court judge may, upon application of the prosecutor or upon his own motion, order the grand jury reconvened for the purpose of dealing with a matter requiring grand jury action.

(h) A written petition for convening of grand jury under this section may be filed by the district attorney, the district attorney's designated assistant, or a special prosecutor requested pursuant to G.S. 114-11.6, with the approval of a committee of at least three members of the North Carolina Conference of District Attorneys, and with the concurrence of the Attorney General, with the Clerk of the North Carolina Supreme Court. The Chief Justice shall appoint a panel of three judges to determine whether to order the grand jury convened. A grand jury under this section may be convened if the three-judge panel determines that:

(1) The petition alleges the commission of or a conspiracy to commit a violation of G.S. 90-95(h) or G.S. 90-95.1, any part of which violation or conspiracy occurred in the county where the grand jury sits, and that persons named in the petition have knowledge related to the identity of the perpetrators of those crimes but will not divulge that knowledge voluntarily or that such persons request that

they be allowed to testify before the grand jury; and

(2) The affidavit sets forth facts that establish probable cause to believe that the crimes specified in the petition have been committed and reasonable grounds to suspect that the persons named in the petition have knowledge related to the identity of the perpetrators of those crimes.

The affidavit shall be based upon personal knowledge or, if the source of the information and basis for the belief are stated, upon information and belief. The panel's order convening the grand jury as an investigative grand jury shall direct the grand jury to investigate the crimes and persons named in the petition, and shall be filed with the Clerk of the North Carolina Supreme Court. A grand jury so convened retains all powers, duties, and responsibilities of a grand jury under this Article. The contents of the petition and the affidavit shall not be disclosed. Upon receiving a petition under this subsection, the Chief Justice shall appoint a panel to determine whether the grand jury should be convened as an investigative grand jury.

A grand jury authorized by this subsection may be convened from an existing grand jury or grand juries authorized by subsection (b) of this section or may be convened as an additional grand jury to an existing grand jury or grand juries. Notwithstanding subsection (b) of this section, grand jurors impaneled pursuant to this subsection shall serve for a period of 12 months, and, if an additional grand jury is convened, 18 persons shall be selected to constitute that grand jury. At any time for cause shown, the presiding superior court judge may excuse a juror temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused. (1779, c. 157, s. 11, P.R.; R.C., c. 31, s. 33; 1879, c. 12; Code, ss. 404, 1742; Rev., ss. 1969, 1971; C.S., ss. 2333, 2336; 1929, c. 228; 1967, c. 218, s. 1; 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 711, s. 24; 1979, c. 177, s. 1; 1981, c. 440, s. 1; 1985 (Reg. Sess., 1986), c. 843, ss. 2, 6; 1987 (Reg. Sess., 1988), c. 1040, ss. 1, 3; 1989 (Reg. Sess., 1990), c. 1039, s. 4; 1991, c. 686, ss. 1, 3; 1995, c. 362, s. 1.)

Editor's Note. —

Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4 amends s. 6 of Chapter 843 of Session Laws 1985 (Reg. Sess., 1986), as amended by s. 1 of Chapter 1040 of Session Laws 1987 (Reg. Sess., 1988), noted in the main volume under this section, to extend its expiration date to October 1, 1993.

Session Laws 1991, c. 686, s. 3 amends Session Laws 1985, c. 843, s. 6, as amended by Session Laws 1987, c. 1040, so as to delete the October 1, 1991 expiration provision. The 1991 act, which is in the coded bill drafting format set out in § 120-20.1, does not mention Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, which amended the 1985 act, as amended, to change the expiration date to October 1, 1993.

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, inserted "the district attorney's designated assistant, or a special prosecutor requested pursuant to G.S. 114-11.6" preceding "with the approval" in the first sentence of subsection (h).

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Written Order to Reconvene Not Required. — Defendant could show no prejudice from the lack of a written application or order of the trial court to have the grand jury reconvened. State v. Parker, 119 N.C. App. 328, 459 S.E.2d 9 (1995).

Issue of Discrimination Raised for First Time on Appeal. — Capital murder defendant waived any claim that his constitutional rights were denied because of racial discrimination in selection of foreman to the grand jury that indicted him where the defendant made no motion challenging any aspect of the indictment and only raised the issue for the first time on appeal. State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990).

Court May Exercise Discretion. — The trial court made findings in support of its conclusion that defendants were not entitled to investigative grand jury documents. Although the court concluded that defendants were not entitled to the documents as a matter of law, there was no indication in the record that the court reached this conclusion under the mistaken belief that it was required to so hold as a matter of law, i.e., that it had no discretion. Thus, defendant's assignment of error was overruled. State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

Cited in State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989).

§ 15A-623. Grand jury proceedings and operation in general.

(a) The finding of an indictment, the return of a presentment, and every other affirmative official action or decision of the grand jury requires the concurrence of at least 12 members of the grand jury.

(b) The foreman presides over all hearings and has the power to administer oaths or affirmations to all witnesses.

(c) The foreman must indicate on each bill of indictment or presentment the witness or witnesses sworn and examined before the grand jury. Failure to comply with this provision does not vitiate a bill of indictment or presentment.

(d) During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to a witness being examined, may, as the occasion requires, also be present:

(1) An interpreter, if needed.

(2) A law-enforcement officer holding a witness in custody.

Any person other than a witness who is permitted in the grand jury room must first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

(e) Grand jury proceedings are secret and, except as expressly provided in this Article, members of the grand jury and all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions.

(f) The presiding judge may direct that a bill of indictment be kept secret until the defendant is arrested or appears before the court. The clerk must seal the bill of indictment and no person including a witness may disclose the finding of the bill of indictment, or the proceedings leading to the finding, except when necessary for the issuance and execution of an order of arrest.

(g) Any grand juror or other person authorized to attend sessions of the grand jury and bound to keep its secrets who discloses, other than to his attorney, matters occurring before the grand jury other than in accordance with the provisions of this section is in contempt of court and subject to proceedings in accordance with law.

(h) If a grand jury is convened pursuant to G.S. 15A-622(h), notwithstanding subsection (d) of this section, a prosecutor shall be present to examine witnesses, and a court reporter shall be present and record the examination of witnesses. The record shall be transcribed. If the prosecutor determines that it is necessary to compel testimony from the witness, he may grant use immunity to the witness. The grant of use immunity shall be given to the witness in writing by the prosecutor and shall be signed by the prosecutor. The written grant of use immunity shall also be read into the record by the prosecutor and shall include an explanation of use immunity as provided in G.S. 15A-1051. A witness shall have the right to leave the grand jury room to consult with his counsel at reasonable intervals and for a reasonable period of time upon the request of the witness. Notwithstanding subsection (e) of this section, the record of the examination of witnesses shall be made available to the examining prosecutor, and he may disclose contents of the record to other investigative or law-enforcement officers, the witness or his attorney to the extent that the disclosure is appropriate to the proper performance of his official duties. The record of the examination of a witness may be used in a trial to the extent that it is relevant and otherwise admissible. Further disclosure of grand jury proceedings convened pursuant to this act may be made upon written order of a superior court judge if the judge determines disclosure is essential:

(1) To prosecute a witness who appeared before the grand jury for contempt or perjury; or

(2) To protect a defendant's constitutional rights or statutory rights to discovery pursuant to G.S. 15A-903.

Upon the convening of the investigative grand jury pursuant to approval by the three-judge panel, the district attorney shall subpoena the witnesses. The subpoena shall be served by the investigative grand jury officer, who shall be appointed by the court. The name of the person subpoenaed and the issuance and service of the subpoena shall not be disclosed, except that a witness so subpoenaed may divulge that information. The presiding superior court judge shall hear any matter concerning the investigative grand jury in camera to the extent necessary to prevent disclosure of its existence. The court reporter for the investigative grand jury shall be present and record and transcribe the in camera proceeding. The transcription of any in camera proceeding and a copy of all subpoenas and other process shall be returned to the Chief Justice or to such member of the three-judge panel as the Chief Justice may designate, to be filed with the Clerk of the North Carolina Supreme Court. The subpoena shall otherwise be subject to the provisions of G.S. 15A-801 and Article 43 of Chapter 15A. When an investigative grand jury has completed its investigation of the crimes alleged in the petition, the investigative functions of the grand jury shall be dissolved and such investigation shall cease. The District Attorney shall file a notice of dissolution of the investigative functions of the grand jury with the Clerk of the North Carolina Supreme Court. (1973, c. 1286, s. 1; 1985 (Reg. Sess., 1986), c. 843, ss. 3, 6; 1987 (Reg. Sess., 1988), c. 1040, ss. 1, 4; 1989 (Reg. Sess., 1990), c. 1039, s. 4; 1991, c. 686, ss. 2, 3.)

Editor's Note. —

Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4 amends s. 6 of Chapter 843 of Session Laws 1985 (Reg. Sess., 1986), as amended by s. 1 of Chapter 1040 of Session Laws 1987 (Reg. Sess., 1988), noted in the main volume under this section, to extend its expiration date to October 1, 1993.

Session Laws 1991, c. 686, s. 3 amends Session Laws 1985, c. 843, s. 6, as amended by Session Laws 1987, c. 1040, so as to delete the October 1, 1991, expiration provision. The 1991 act, which is in the coded bill drafting format set out in § 120-20.1, does not mention Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, which amended the 1985 act, as amended, to change the expiration date to October 1, 1993.

CASE NOTES

Transcripts Not Required by Federal Courts. — Federal courts will not require North Carolina Superior Courts to have grand jury transcripts produced to defendants; to do so would be to act as a state appeals court and reverse an order by the Superior Court and to intrude into what is a statutorily defined part of the state court. Shell v. Wall, 760 F. Supp. 545 (W.D.N.C. 1991).

Stated in Ragan v. County of Alamance, 98 N.C. App. 636, 391 S.E.2d 825 (1990).

Cited in In re Alamance County Ct. Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992); State v. Basden, 110 N.C. App. 449, 429 S.E.2d 740 (1993); State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (1993).

§ 15A-627. Submission of bill of indictment to grand jury by prosecutor.

CASE NOTES

Cited in State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374 (1992).

§ 15A-628. Functions of grand jury; record to be kept by clerk.

CASE NOTES

Transcript Not Required by Federal Courts. — Federal courts will not require North Carolina Superior Courts to have grand jury transcripts produced to defendants; to do so would be to act as a state appeals court and reverse an order by the Superior Court and to intrude into what is a statutorily defined part of the state court. Shell v. Wall, 760 F. Supp. 545 (W.D.N.C. 1991).

Cited in State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

§ 15A-631. Grand jury venue.

CASE NOTES

Return of Indictment Is Matter of Venue, Not Jurisdiction. — Even if trafficking indictment failed to name Wake County as a county in which offense occurred, and venue was therefore technically incorrect in Wake County, the Superior Court of Wake County nevertheless had jurisdiction to try the offense, as under this section the return of an indictment is a matter of venue, not jurisdiction. State v. Carter, 96 N.C. App. 611, 386 S.E.2d 620, cert. denied, 326 N.C. 365, 389 S.E.2d 817 (1989).

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.

CASE NOTES

Effect on § 15-1. — There is no stated purpose in this section that indicates the legislature intended to repeal § 15-1. Furthermore this section appears to be an effort by the legislature to codify the common law that permitted the use of presentments by grand juries but prohibited the arrest and trial of defendants on a presentment. Thus, § 15-1 has not been repealed and remains a part of the law of this State; it would support the order of the trial court denying defendant's motion to dismiss. State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (1995).

Court not required to instruct indicting grand jury on elements of crime in question. State v. Treadwell, 99 N.C. App. 769, 394 S.E.2d 245 (1990).

Quoted in State v. Birdsong, 325 N.C. 418, 384 S.E.2d 5 (1989).

Cited in State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); State v. Snyder, 343 N.C. 61, 468 S.E.2d 221 (1996).

§ 15A-642. Prosecutions originating in superior court to be upon indictment or information; waiver of indictment.

CASE NOTES

Applied in State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991).

Quoted in State v. Neville, 108 N.C. App. 330, 423 S.E.2d 496 (1992).

Stated in State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995).

Cited in State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

§ 15A-644. Form and content of indictment, information or presentment.

CASE NOTES

Cited in State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

§ 15A-644.1. Filing of information when plea of guilty or no contest in district court to Class H or I felony.

A defendant who pleads guilty or no contest in district court pursuant to G.S. 7A-272(c)(1) shall enter that plea to an information complying with G.S. 15A-644(b), except it shall contain the name of the district court in which it is filed. (1995 (Reg. Sess., 1996), c. 725, s. 3.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 725, s. 11, made this section effective December 1, 1996, and applicable to offenses committed on or after that date.

§ 15A-646. Superseding indictments and informations.

CASE NOTES

Cited in State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§§ 15A-701 through 15A-710: Repealed by Session Laws 1989, c. 688, s. 1, effective October 1, 1989.

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.

(a) When a criminal defendant is confined in a penal or other institution under the control of the State or any of its subdivisions and his presence is required for trial, the prosecutor may make written request to the custodian of the institution for temporary release of the defendant to the custody of an appropriate law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. The request of the prosecutor is sufficient authorization for the release, and must be honored, except as otherwise provided in this section.

(b) If the defendant whose presence is sought is confined pursuant to another criminal proceeding in a different prosecutorial district as defined in G.S. 7A-60, the defendant and the prosecutor prosecuting the other criminal action must be given reasonable notice and opportunity to object to the temporary release. Objections must be heard by a superior court judge having authority to act in criminal cases in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the defendant is confined, and he must make appropriate orders as to the precedence of the actions.

(c) A defendant who is confined in an institution in this State pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the prosecutor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed.

(d) Detainer. —

(1) When a criminal defendant is imprisoned in this State pursuant to prior criminal proceedings, the clerk upon request of the prosecutor, must transmit to the custodian of the institution in which he is imprisoned, a copy of the charges filed against the defendant and a detainer directing that the prisoner be held to answer to the charges made against him. The detainer must contain a notice of the prisoner's right to proceed pursuant to G.S. 15A-711(c).

(2) Upon receipt of the charges and the detainer, the custodian must immediately inform the prisoner of its receipt and furnish him copies of the charges and the detainer, must explain to him his right to proceed pursuant to G.S. 15A-711(c).

(3) The custodian must notify the clerk who transmitted the detainer of the defendant's impending release at least 30 days prior to the date of release. The notice must be given immediately if the detainer is received less than 30 days prior to the date of release. The clerk must direct the sheriff to take custody of the defendant and produce him for trial. The custodian must release the defendant to the custody of the sheriff, but may not hold the defendant in confinement beyond the date on which he is eligible for release.

(4) A detainer may be withdrawn upon request of the prosecutor, and the clerk must notify the custodian, who must notify the defendant. (1949, c. 303; 1953, c. 603; 1957, c. 349, s. 10; c. 1067, ss. 1, 2; 1967, c. 996, ss. 13, 15; 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1979, c. 107, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 61; 1989, c. 688, s. 3.)

ARTICLE 37.

Uniform Criminal Extradition Act.

§ 15A-730. Rights of accused person; application for writ of habeas corpus.

CASE NOTES

Findings in adult and juvenile proceedings need not be the same; however, § 7A-689 requires some findings of fact to protect a juvenile in this State from being improperly returned to the demanding state. In re Teague, 91

N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

§ 15A-731. Penalty for noncompliance with § 15A-730.

Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the Governor's warrant, in willful disobedience to G.S. 15A-730, shall be guilty of a Class 2 misdemeanor. (1937, c. 273, s. 11; 1973, c. 1286, s. 16; 1993, c. 539, s. 302; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, c. 302, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 15A-743. Application for issuance of requisition; by whom made; contents.

(a) When the return to this State of a person charged with crime in this State is required, the prosecuting attorney shall present to the Governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to this State for trial and that the proceeding is not instituted to enforce a private claim.

(b) When the return to this State is required of a person who has been convicted of a crime in this State and has escaped from confinement or broken the terms of his bail, probation or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the Director of Prisons or sheriff of the county from which escape was made, shall present to the Governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is believed to be, including the location of the person therein at the time application is made.

(c) The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. A copy of all papers shall be forwarded with the Governor's requisition. (1937, c. 273, s. 23; 1973, c. 1286, s. 16; 1975, c. 132; 1993, c. 83, s. 1.)

CASE NOTES

Findings in adult and juvenile proceedings need not be the same; however, § 7A-689 requires some findings of fact to protect a juvenile in this State from being improperly returned to the demanding state. In re Teague, 91 N.C. App. 242, 371 S.E.2d 510, cert. denied, 323 N.C. 624, 374 S.E.2d 588 (1988).

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on Detainers entered into; form and contents.

CASE NOTES

Applied in State v. Schirmer, 104 N.C. App. 472, 409 S.E.2d 704 (1991).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

§ 15A-801. Subpoena for witness.

CASE NOTES

Cited in State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990).

§ 15A-802. Subpoena for the production of documentary evidence.

CASE NOTES

Cited in State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990).

§ 15A-803. Attendance of witnesses.

CASE NOTES

Cited in State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995).

ARTICLE 43.

Uniform Act to Secure Attendance of Witnesses from without a State in Criminal Proceedings.

§ 15A-812. Summoning witness in this State to testify in another state.

CASE NOTES

Evidence Insufficient to Show Witness Not a Material Witness. — Where the trial court failed to make findings of fact or conclusions of law, there was insufficient competent evidence to support the trial court's order finding that individual sought to be subpoenaed from out-of-state was not a material witness and that enforcement of the subpoena duces tecum would cause an undue hardship to her. In re McKinny, — N.C. App. —, 462 S.E.2d 530 (1995).

§ 15A-813. Witness from another state summoned to testify in this State.

CASE NOTES

Cited in State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

ARTICLE 45.

Fair Treatment for Victims and Witnesses.

§ 15A-824. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Crime" means a serious misdemeanor as determined in the sole discretion of the district attorney, any felony, or any act committed by a juvenile that, if committed by a competent adult, would constitute a felony.

(2) "Family member" means a spouse, child, parent or legal guardian, or the closest living relative.

(3) "Victim" means a person against whom there is probable cause to believe a crime has been committed.

(4) "Witness" means a person who has been or is expected to be summoned to testify for the prosecution in a criminal action concerning a felony, or who by reason of having relevant information is subject to being called or is likely to be called as a witness for the prosecution in such an action, whether or not an action or proceeding has been commenced. (1985 (Reg. Sess., 1986), c. 998, s. 1; 1989, c. 596, s. 1.)

§ 15A-825. Treatment due victims and witnesses.

To the extent reasonably possible and subject to available resources, the employees of law-enforcement agencies, the prosecutorial system, the judicial system, and the correctional system should make a reasonable effort to assure that each victim and witness within their jurisdiction:

(1) Is provided information regarding immediate medical assistance when needed and is not detained for an unreasonable length of time before having such assistance administered.

(2) Is provided information about available protection from harm and threats of harm arising out of cooperation with law-enforcement prosecution efforts, and receives such protection.

(2a) Is provided information that testimony as to one's home address is not relevant in every case, and that the victim or witness may request the district attorney to raise an objection should he/she deem it appropriate to this line of questioning in the case at hand.

(3) Has any stolen or other personal property expeditiously returned by law-enforcement agencies when it is no longer needed as evidence, and its return would not impede an investigation or prosecution of the case. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property whose ownership is disputed, should be photographed and returned to the owner within a reasonable period of time of being recovered by law-enforcement officials.

(4) Is provided appropriate employer intercession services to seek the employer's cooperation with the criminal justice system and minimize the employee's loss of pay and other benefits resulting from such cooperation whenever possible.

(5) Is provided, whenever practical, a secure waiting area during court proceedings that does not place the victim or witness in close proximity to defendants and families or friends of defendants.

(6) Is informed of the procedures to be followed to apply for and receive any appropriate witness fees or victim compensation.

(6a) Is informed of the right to be present throughout the entire trial of the defendant, subject to the right of the court to sequester witnesses.

(7) Is given the opportunity to be present during the final disposition of the case or is informed of the final disposition of the case, if he has requested to be present or be informed.

(8) Is notified, whenever possible, that a court proceeding to which he has been subpoenaed will not occur as scheduled.

(9) Has a victim impact statement prepared for consideration by the court.

(9a) Prior to trial, is provided information about plea bargaining procedures and is told that the district attorney may recommend a plea bargain to the court.

(10) Is informed that civil remedies may be available and that statutes of limitation apply in civil cases.

(11) Upon the victim's written request, is notified before a proceeding is held at which the release of the offender from custody is considered, if the crime for which the offender was placed in custody is a Class G or more serious felony.

(12) Upon the victim's written request, is notified if the offender escapes from custody or is released from custody, if the crime for which the offender was placed in custody is a Class G or more serious felony.

(13) Has family members of a homicide victim offered all the guarantees in this section, except those in subdivision (1).

Nothing in this section shall be construed to create a cause of action for failure to comply with its requirements. (1985 (Reg. Sess., 1986), c. 998, s. 1; 1989, c. 596, s. 2.)

Legal Periodicals. — For comment, "Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System," see 72 N.C.L. Rev. 1479 (1994).

CASE NOTES

Use of Victim Impact Statements at Sentencing Hearings. — Victim impact statements may be used at sentencing hearings, except in capital cases. State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989).

Victim's or Witness' View of Evidence Has No Proper Place in Impact Statement. — What a victim or a witness thinks the evidence in a case shows or what the defendant's punishment should be is not an effect of crime, but advocacy, and such thoughts have no place in a proper impact statement, but holding that statements by victim's sisters on Victim Impact Statement forms as to the sentence which they believed defendant should receive were harmless under the circumstances. State v. Jackson, 91 N.C. App. 124, 370 S.E.2d 687 (1988).

Introduction of Victim Impact Statements Not Prejudicial. — Where court found no aggravating factor based on evidence adduced by victim impact statements introduced at defendant's sentencing hearing, defendant was shown the statements at the hearings and objected to their admission but did not move for a continuance to seek evidence in rebuttal or to issue subpoenas for the persons who made the statements, and the matters contained in the statements had been brought to the court's attention during the actual trial, defendant failed to show how he was prejudiced by introduction of the statements. State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989).

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-901. Application of Article.

CASE NOTES

Court's Power to Compel Disclosure Regarding Post-Trial Motion. — The judiciary must and does have the inherent power to compel disclosure of relevant facts regarding a post-trial motion and may order such disclosure prior to a hearing on such motion. State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990).

Criminal Investigatory Reports. — Plaintiff was precluded by this Article from obtaining copies of recordings which were unquestionably gathered by a city police department in the course of a criminal investigation and were part of the State's file in a pending criminal action. Piedmont Publishing Co. v. City of Winston-Salem, 334 N.C. 595, 434 S.E.2d 176 (1993).

Cited in State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

§ 15A-902. Discovery procedure.

CASE NOTES

Failure to Impose Sanctions Not Improper. —

In prosecution for first-degree sexual offense and taking indecent liberties with children, the defendant was not prejudiced by the admission of the deputy's testimony that the defendant stated his birthdate during the booking procedure, where there was ample evidence aside from defendant's statement from which the jury could have found that defendant was at least 16 years of age at the time of the crimes; therefore, even assuming that the statement was discoverable, that the state should have produced it pursuant to defendant's discovery request and that the trial court should have imposed sanctions pursuant to § 15A-910, the error was harmless. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Court's Choice of Sanction Found Appropriate. — Even if the State's failure to inform defendant about a second fingerprint in existence did not comply with the discovery article, the court's refusal to either suppress the evidence or continue the trial was not necessarily error, since the court did sanction the State in one of the ways authorized by the statute (by granting a recess and requiring the State's witness to confer with defense counsel and to be interrogated under oath before he testified) and that way was neither inappropriate nor beyond the court's discretion. State v. Hall, 93 N.C. App. 236, 377 S.E.2d 280, cert. denied, 324 N.C. 579, 381 S.E.2d 777 (1989).

Substantial Compliance with Statutory Requirements. — Where the record on appeal indicated that the State was unsure of the status or the probative value of a check due to its illegibility, the trial court also found the check to be illegible, and when a clear copy of the check was obtained by the State, defense counsel was present and was given the legible copy at that time, the State substantially complied with the requirements of the discovery statutes in regard to the check. State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988), rev'd on other grounds, 324 N.C. 340, 391 S.E.2d 165 (1990).

Where the record indicated that the State did not intend to use a partnership breakdown initially but decided to use it after admission of other evidence was denied, the evidence did not appear to have been obtained directly from defendant or to belong to defendant, nor did it appear to have been material to the preparation of defendant's defense, and at the time the State decided to use the evidence it was made available to defendant for examination, the State substantially complied with the discovery statutes. State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988), rev'd on other grounds, 324 N.C. 340, 391 S.E.2d 165 (1990).

Stated in State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

Cited in State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

§ 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

CASE NOTES

I. General Consideration.
II. Statement of Defendant.
IV. Statements of Witnesses.
V. State Witnesses.
VI. Documents, Tangible Objects, and Reports.

I. GENERAL CONSIDERATION.

The purpose of discovery under the statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate. State v.

Payne, 327 N.C. 194, 394 S.E.2d 158 (1990), cert. denied, 498 U.S. 1092, 111 S. Ct. 977, 112 L. Ed. 2d 1062 (1991).

A major purpose of the discovery procedures of Chapter 15A is to protect the defendant from unfair surprise. When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

This section was patterned after F.R. Crim. P., Rule 16, which was initially adopted in 1946 and amended several times thereafter. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

This Section Restricted by § 15A-904(a). — State did not have a duty to provide defendant with a complete copy of the police investigatory report pursuant to this section; this section is restricted by § 15A-904(a), and therefore, defendant lacked the requisite statutory authority to request the production of the police investigatory report. State v. Lineberger, 100 N.C. App. 307, 395 S.E.2d 716 (1990).

Work-Product Not Discoverable. —

The statutory provisions set out in this section do not alter the general rule that the work product or investigative files of the district attorney, law enforcement agencies, and others assisting in the preparation of a case are not open to discovery. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Open File Policy. — While the prosecutor may, in his or her discretion, proceed under an open file policy, he or she may not be forced to do so. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Where defendant "slept on his rights," etc. —

Defendant could not contend he was deprived of his right to test evidence where he made no attempt to do so during the many months preceding the trial. State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

Compliance with Agreement Entered into in Other District. — The District Attorney in one district may not be compelled to comply with an agreement pertaining to discovery entered into by the District Attorney in another district once venue has been changed in the case. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Applied in State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990); State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (1994); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994); State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995); State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

Quoted in State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (1990), cert. denied, appeal dismissed, 328 N.C. 95, 402 S.E.2d 423 (1991); State v. Lopez, 101 N.C. App. 217, 398 S.E.2d 886 (1990); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994).

Stated in State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

Cited in State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Bridges, 325 N.C. 529, 385 S.E.2d 337 (1989); State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992); State v. Quarg, 334 N.C. 92, 431 S.E.2d 1 (1993); State v. Tunstall, 334 N.C. 320, 432 S.E.2d 331 (1993); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Smith, 337 N.C. 658, 447 S.E.2d 376 (1994); State v. McCarver, 341 N.C. 426, 462 S.E.2d 25 (1995); State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995).

II. STATEMENT OF DEFENDANT.

Duty of State to Disclose. — Subdivision (a)(2) of this section requires the State to disclose to the defendant the substance of any relevant statement made by the defendant which is in the possession of the State and the existence of which is known to the prosecutor. State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991).

Facts and Circumstances, etc. —

Where the State complied with subsection (a)(2) of this section by disclosing that portion of state's witness' statement which recited defendant's own words from a jailhouse conversation, defendant was not entitled to a description of the facts and circumstances surrounding these statements. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Pretrial Statement. — The trial court acted within its discretion in refusing to impose sanctions against the State for introducing the defendant's pretrial statement, even though he was not provided with the tape recorded version of the statement, where the defendant was furnished the substance of the defendant's statement by way of a copy of the officer's written report months before trial the defense counsel became aware of the existence of the tape recording three days before the introduction of the written report, and on the same date, defense counsel was given an opportunity to listen to the tape, but she neither had the tape recording analyzed nor scheduled a future date upon which to have it analyzed, nor did the defense counsel call the officer, who was present throughout the interview, in an attempt to clarify any inaudible portions of the recording. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Use of Statement After Defendant Raised Matter. — In a trial for sexual abuse of a child, the trial court did not abuse its discretion by allowing the State to introduce defendant's statements to the Department of Social Services (DSS) about his prior acts of sexual abuse of a different child in an unrelated case where defendant "opened the door" to the matter by cross-examining the DSS witness about DSS files containing the statement. Although the State did not reveal the statement in response to defendant's motion under this section, neither did the State attempt to use the statement prior to defendant's questions of the DSS witness. State v. Moore, 103 N.C. App. 87, 404 S.E.2d 695 (1991).

IV. STATEMENTS OF WITNESSES.

Statements Before Grand Jury. — Defendant was not prejudiced by the actions of the trial judge in providing defendant with excerpts from grand jury testimony given by witnesses rather than with all of the witnesses' statements, as defendant had requested. State v. Baker, 112 N.C. App. 410, 435 S.E.2d 812 (1993), cert. denied, 335 N.C. 561, 441 S.E.2d 123 (1994).

No Violation of Defendant's Rights. — Where the trial court followed the requirements of subdivision (f)(1) in making the witnesses' statements available to the defense after the witnesses had testified on direct, and where the court afforded defense counsel sufficient time to examine and study the statements and to prepare for cross-examination, there was no constitutional violation of defendant's rights. State v. Batts, 93 N.C. App. 404, 378 S.E.2d 211 (1989).

Sanctions on Abuse of Discretion. — Court abused its discretion for dismissing murder case under § 15A-910 where there was no evidence that witness made a statement as defined in this section. State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (1994).

V. STATE WITNESSES.

No Right to List of State Witnesses. —

Defendant had no right to a list of the State's witnesses, and defendant did not show specific prejudice so as to constitute an abuse of discretion by the trial court in denying his request. State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994).

Legislature Expressly Rejected Such Right. —

The legislature has expressly refused to adopt a requirement that the State furnish the accused with the names of its witnesses. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Identity of Confidential Informant. — Generally the State has the privilege of withholding a confidential informant's identity from a defendant, but there are exceptions. State v. Jackson, 103 N.C. App. 239, 405 S.E.2d 354 (1991), aff'd, 331 N.C. 114, 413 S.E.2d 798 (1992).

Test for Disclosure of Informant's Identity. — Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), sets forth the test to be applied when the disclosure of an informant's identity is requested. The trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his case. State v. Jackson, 103 N.C. App. 239, 405 S.E.2d 354 (1991), aff'd, 331 N.C. 114, 413 S.E.2d 798 (1992).

Refusal to Compel Disclosure of Informant's Identity Upheld. — Where defendant offered no defense on the merits, so there was no contradiction between his evidence and the State's evidence for informant's testimony to clarify, and no testimony by the informant was admitted at trial (as the testimony of three law enforcement officers established defendant's guilt), and the State asserted that disclosure of the informant's identity would jeopardize pending investigations, it was not error to deny the defendant's motion to compel disclosure of the informant's identity. State v. Jackson, 103 N.C. App. 239, 405

S.E.2d 354 (1991), aff'd, 331 N.C. 114, 413 S.E.2d 798 (1992).

Interviews of State Witnesses. —

Nothing in this Article compels State witnesses to subject themselves to questioning by the defense before trial. State v. Phillips, 328 N.C. 1, 399 S.E.2d 293, cert. denied, 501 U.S. 1208, 111 S. Ct. 2804, 115 L. Ed. 2d 977 (1991).

Pathologist's Testimony. — Where defendant contended it was error to allow a pathologist to testify that a knife which had belonged to the defendant was consistent with the size and shape of the wounds inflicted on the victim and the pathologist did not do any particular tests on the knife, but simply opened it, looked at the blade, and measured it, this was not the type of test whose result must be given to the defendant pursuant to subsection (e). This testimony had some probative value and it was not error to admit it. State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994), cert. denied, — U.S. —, 115 S. Ct. 923, 130 L. Ed. 2d 802 (1995).

Testimony Regarding Overheard Telephone Conversation Admissable. — Where the State immediately relayed the substance of detective's statement regarding overheard telephone conversation, wherein defendant admitted guilt to a third party, to the defense upon learning of it, there was no abuse of discretion by the trial court in refusing the requested sanctions and no error in the admission of the testimony; the trial court did grant the defendant a continuance from Thursday until Monday to allow the defense time to prepare for testimony concerning the telephone conversation. State v. Jackson, 340 N.C. 301, 457 S.E.2d 862 (1995).

Changes in police officers' report omitting racial phraseology and substituting acceptable terminology did not impermissibly violate this section. State v. Swann, 115 N.C. App. 92, 443 S.E.2d 740 (1994).

Where witness had not made a specific statement prior to his testimony, the State could not reasonably have been expected to relate the statement to defendant as it had no knowledge of such. State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994).

Examination by Witness Made for First Time at Trial. — While this section requires the State to allow defendant access to any results, reports of physical or mental examinations, tests, measurements or experiments made in connection with the case, detective called as expert on fingerprint analysis did not conduct any tests in preparation for this trial and did not testify regarding any test results or examinations specific to the case; he formulated his opinion as to the cellophane bag based on an examination made for the first time at trial and was therefore not subject to discovery requirements. State v. Lane, 119 N.C. App. 197, 458 S.E.2d 19 (1995).

Criminal Records of State Witnesses. —

Where no request was made for a copy of defendant's criminal record, failure to make such a request constitutes a waiver by defendant of his right to discovery of his record under subsection (c). State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, — U.S. —, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

Parole Record of State Witness. — Neither this statute nor the common law gives a defendant the right to discover the parole record of a witness for the state. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

No Authority to Order Disclosure of State Witnesses or Persons Interrogated. — The trial court does not have the authority to order the state to disclose to defendant either the names of the state's witnesses or the statements of all persons interrogated or interviewed during the investigation. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

No Requirement to Make Available State Investigation Files, Agents, or Criminal Records. — No statutory provision or constitutional principle requires the trial court to order the state to make available to a defendant all of its investigative files relating to his case or the names of all agents who participated in the investigation, or to disclose the criminal records of the state's witnesses. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

VI. DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS.

Independent Chemical Analysis of Seized Substances. —

A defendant enjoys a concomitant statutory right to inspect the crime scene and to independently analyze seized substances. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Trial judge would have discretionary power to permit second physical examination of alleged sexual-abuse victim if defendant showed court that examination would be probative, that it was necessary to defendant's preparation of his defense, and if the victim or the victim's guardian consented to examination. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Trial court did not abuse its discretion in failing to sanction the State for failure to disclose the results of footprint comparisons, where when the State offered footprint comparison evidence, the defendant did not object or request sanctions against the State. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Refusal to Have Children Examined by Second Expert Held Proper. — In child abuse case where defendant argued that children's bodies are physical evidence susceptible to objective tests and examinations like any other physical evidence which is to be used at trial, trial judge did not err in his refusal to grant defendant opportunity to have children examined by a second expert since defendant did not make credible showing to trial judge that additional examinations he requested would have been probative. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Entitlement to Pretrial Discovery of Laboratory Tests. — Like F.R. Crim. P., Rule 16(a)(1)(D), subsection (e) of this section must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions. However, unlike the federal rule, no requirement exists under this section that such information be material to the preparation of the defense or intended for use by the State in its case in chief. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Defendant was entitled to pretrial discovery of chemist's laboratory form indicating the various tests performed on the substance at issue, the results thereof, and the graph of the infrared scan, as the information sought by defendant was discoverable pursuant to subsection (e) of this section and the North Carolina Constitution. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Where photographs were not available to defendant before trial, even though defendant filed a pre-trial motion for discovery requesting a listing and description of any photographs within the State's possession which pertained to defendant's alleged crime, but the photographs were made available to defendant before they were introduced into evidence, and defendant did not request that the court allow her additional time to examine these photographs after she had obtained access to them and did not allege that the prosecuting attorney acted in bad faith, trial court did not err in admitting the photographs as evidence. State v. Drewyore, 95 N.C. App. 283, 382 S.E.2d 825 (1989).

No Blood Samples Available for Defendant. — Where all blood taken from automobile to be tested by the State was consumed in conducting the test so that there was no blood available to furnish to the defendant for testing, the court did not err in admitting the results of State's tests absent any evidence of bad faith on the part of the State. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223, cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

§ 15A-904. Disclosure of evidence by the State — Certain reports not subject to disclosure.

CASE NOTES

I. General Consideration.
II. State Witnesses.
III. Attorney's Work Product.

I. GENERAL CONSIDERATION.

Section Limits § 15A-903. —

State did not have a duty to provide defendant with a complete copy of the police investigatory report pursuant to

§ 15A-903; the above-mentioned section is restricted by subsection (a), and therefore, defendant lacked the requisite statutory authority to request the production of the police investigatory report. State v. Lineberger, 100 N.C. App. 307, 395 S.E.2d 716 (1990).

Trial Court Has No Authority to Order Discovery Contrary to Section. —

In accord with first paragraph of the main volume. See State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

Internal police reports and memoranda prepared by law-enforcement officers are not made discoverable by this section. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Investigative Files of Those Preparing State's Case. — The investigative files of the district attorney, law enforcement agencies, and others helping to prepare the case were not open to discovery. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

Evidence of State's Failure to Uncover Evidence of Defendant's Use of Public Transportation Held Not Discoverable. — The failure of the State to offer any evidence that the defendant used the public transportation system to return from Atlanta to Rocky Mount at or about the time the victim's body was found in Atlanta may have been a proper matter for jury argument, but evidence of the State's failure to develop such proof, was not subject to discovery. State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

Open File Policy. — While the prosecutor may, in his or her discretion, proceed under an open file policy, he or she may not be forced to do so. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Discovery Agreement from Other District. — The District Attorney in one district may not be compelled to comply with an agreement pertaining to discovery entered into by the District Attorney in another district once venue has been changed in the case. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Applied in State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

Stated in State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

II. STATE WITNESSES.

No Authority to Order Disclosure of State Witnesses or Persons Interrogated. — Trial court does not have the authority to order the state to disclose to defendant either the names of the state's witnesses or the statements of all persons interrogated or interviewed during the investigation. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

State is not required to furnish defendant before trial any statement made by a witness of the State to anyone acting on behalf of the State. If the statement in question is material and favorable to the defendant, the State is required to disclose it to the defense at trial. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

III. ATTORNEY'S WORK PRODUCT.

Work Product Not Discoverable. — The statutory provisions set out in § 15A-903 do not alter the general rule that the work product or investigative files of the district attorney, law enforcement agencies, and others assisting in the preparation of a case are not open to discovery. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Defense Counsel Not Allowed to Review Investigative File. — The trial court did not err in not allowing defense counsel to review the entire investigative file compiled in the case since the investigative file requested by defendant consisted of internal documents made by law enforcement officers, and none of it was subject to discovery by defendant. State v. Alverson, 91 N.C. App. 577, 372 S.E.2d 729 (1988).

§ 15A-905. Disclosure of evidence by the defendant — Information subject to disclosure.

CASE NOTES

Meaningful, Useful Report. — Within the meaning of this statute is the requirement that the State be provided in advance of the witness' testimony with a meaningful report which the State can use in preparation for trial. State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994), cert. denied, — U.S. —, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994).

The State was entitled to inspect and copy incomplete personality test which provided expert witness with some "raw data," and to cross-examine expert witness on that subject. State v. McCarver, 341 N.C. 426, 462 S.E.2d 25 (1995).

No Time Limitation for Discovery. — Where the trial court ordered the prosecution to provide discovery to defendant and also ordered reciprocal discovery by defendant to the State within two weeks after the State met its deadline, as subsection (b) sets no time limitation by which a defendant must furnish the State with discovery, and defendant made no showing that the time set by the trial court was unreasonable, the trial court did not exceed its authority. State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994).

Report of Expert's Examination. — By stating in its order that defense counsel must prepare a report if the expert's examination was to be used at trial, the trial court was ensuring fairness to both sides in the preparation of their case. State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), cert. denied, — U.S. —, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

Applied in State v. White, 331 N.C. 604, 419 S.E.2d 557 (1992).

§ 15A-906. Disclosure of evidence by the defendant — Certain evidence not subject to disclosure.

CASE NOTES

Court's Disclosure Order Held Overbroad. — By alleging in his amended motion for appropriate relief that his court-appointed attorney, the Public Defender, rendered ineffective assistance of counsel during the trial and direct appeal of his cases, defendant waived the benefits of both the attorney-client privilege and the work product privilege, but only with respect to matters relevant to his allegations of ineffective assistance of counsel; therefore, as the order of the Superior Court directed the defendant to provide the state access to "all files relating to these cases" without limiting the ordered disclosure to matters relevant to issues raised by the defendant's allegations of ineffective assistance of counsel, the order of the Superior Court was overbroad and exceeded its authority. State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990).

§ 15A-907. Continuing duty to disclose.

CASE NOTES

Stated in State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994).

§ 15A-910. Regulation of discovery — Failure to comply.

CASE NOTES

Particular Remedy Within Discretion, etc. —

The determination of what are appropriate sanctions for violation of a discovery order is within the sound discretion of the trial court. State v. Lopez, 101 N.C. App. 217, 398 S.E.2d 886 (1990).

Defendant's Duty to Inform Trial Court of Potential Unfair Surprise. — A major purpose of the discovery procedures of this chapter is to protect the defendant from unfair surprise. When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

Sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Failure to Impose Sanctions Not Improper. —

In prosecution for first-degree sexual offense and taking indecent liberties with children, the defendant was not prejudiced by the admission of the deputy's testimony that the defendant stated his birthdate during the booking procedure, where there was ample evidence aside from defendant's statement from which the jury could have found that defendant was at least 16 years of age at the time of the crimes; therefore, even assuming that the statement was discoverable, that the state should have produced it pursuant to defendant's discovery request and that the trial court should have imposed sanctions pursuant to this section, the error was harmless. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Trial court did not err in allowing medical technician to testify concerning a matter not provided in discovery; this section gives the trial court broad discretionary powers, and since the court granted a recess in order to allow counsel time to meet the evidence, no abuse of discretion was committed by the trial court. State v. Fenn, 94 N.C. App. 127, 379 S.E.2d 715, cert. denied, 325 N.C. 548, 385 S.E.2d 504 (1989).

The courts are bound by the discretionary decision of a local board of education in selecting and determining the land necessary to construct a school, school building, school bus garage, a parking area, an access road suitable for school buses or "other school facilities" unless that decision is an arbitrary abuse of discretion or disregard of law. Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995), aff'd, 342 N.C. 648, 466 S.E.2d 717, rehearing denied, 343 N.C. 128, 468 S.E.2d 778 (1996).

Trial court acted within its discretion in refusing to impose sanctions against the State for introducing the defendant's pretrial statement, even though he was not provided with the tape recorded version of the statement, where the defendant was furnished the substance of the defendant's statement by way of a copy of the officer's written report months before trial the defense counsel became aware of the existence of the tape recording three days before the introduction of the written report, and on the same date, defense counsel was given an opportunity to listen to the tape, but she neither had the tape recording analyzed nor scheduled a future date upon which to have it analyzed, nor did the defense counsel call the officer, who was present throughout the interview, in an attempt to clarify any inaudible portions of the recording. State v. Herring, 322 N.C. 753, 370 S.E.2d 363 (1988).

Trial court did not abuse its discretion in failing to sanction the State for failure to disclose the results of footprint comparisons, where when the State offered footprint comparison evidence, the defendant did not object or request sanctions against the State. State v. Herring, 322 N.C. 753, 370 S.E.2d 363 (1988).

Failure to Comply Held Harmless Error. — Any error in the failure of the State to comply with discovery in robbery case was harmless beyond a reasonable doubt. State v. Everette, 111 N.C. App. 775, 433 S.E.2d 802 (1993).

No Error Where Trial Court Cured Possible Prosecutor's Noncompliance by Imposition of Sanctions. — Assuming arguendo that agent's notes on his examination of defendant's pubic hairs in a rape case were discoverable and that the State should have produced them pursuant to defendant's discovery request, the trial court cured the prosecutor's failure to comply by its generous imposition of three statutory sanctions by ordering the prosecutor to allow inspection of agent's notes, granted defendant a recess and offered defendant an additional opportunity to cross-examine agent about the notes. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

Court's Choice of Sanction Found Appropriate. — Even if the State's failure to inform defendant about the second fingerprint did not comply with the discovery article, the court's refusal to either suppress the evidence or continue the trial was not necessarily error, since the court did sanction the State in one of the ways authorized by the statute (by granting a recess and requiring the State's witness to confer with defense counsel and to be interrogated under oath before he testified) and that way was neither inappropriate nor beyond the court's discretion. State v. Hall, 93 N.C. App. 236, 377 S.E.2d 280, cert. denied, 324 N.C. 579, 381 S.E.2d 777 (1989).

Dismissal with Prejudice. — Where the prosecution refused to comply with disclosure order, the court did not err by dismissing with prejudice the charges against defendant. State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994).

Sanctions Held An Abuse of Discretion. — Court abused its discretion for dismissing murder case under this section, where there was no evidence that witness made a statement as defined in § 15A-903; therefore the trial court was not authorized to impose sanctions for violating this section. State v. Shedd, 117 N.C. App. 122, 450 S.E.2d 13 (1994).

Refusal to Grant Mistrial or Continuance Not Abuse of Discretion. — Refusal of court to grant a mistrial or continuance based on failure of the State to disclose that a seized medicine bottle within its possession had been subjected to an unsuccessful fingerprint analysis held not an abuse of discretion. State v. Hodge, 118 N.C. App. 655, 456 S.E.2d 855 (1995).

Applied in State v. Thibodeaux, 341 N.C. 53, 459 S.E.2d 501 (1995).

Quoted in State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991); State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (1994).

Stated in State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991); State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

Cited in State v. Drewyore, 95 N.C. App. 283, 382 S.E.2d 825 (1989); State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990); State v. Swann, 115 N.C. App. 92, 443 S.E.2d 740 (1994); State v. McCarver, 341 N.C. 426, 462 S.E.2d 25 (1995).

ARTICLE 49.

Pleadings and Joinder.

§ 15A-922. Use of pleadings in misdemeanor cases generally.

CASE NOTES

Quoted in In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

Stated in State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995).

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

CASE NOTES

This statute has been construed to mean only that an indictment may not be amended in a way which would substantially alter the charge set forth in the indictment. Thus, for example, where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment. State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994).

An indictment may not be amended. State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (1995).

Term "amendment" in subsection (e), etc. —

In accord with the main volume. See State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990); State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990).

Change in Allegation of Ownership. — Deletion by trial court of the words, "Mike Frost, president" from indictments charging defendant with embezzlement to change ownership from Mike Frost, an individual, to Petroleum World, Inc., a corporation, was a substantial alteration of the indictment prohibited by subsection (e) of this section. State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (1995).

Correction of Victim's Name. — Change to indictments which had stated victim's name as Pettress Cebron to correctly reflect the victim's name as Cebron Pettress was not an amendment within the meaning of subsection (e) of this section, and the trial court properly allowed this change. State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990).

Where a change in the name of the victim substantially altered the charge in the indictment, the trial court was without authority to allow the amendment. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Change in County On Indictment. — Where the defendant could not have been misled or surprised as to the nature of the charges against him, the substitution of Mitchell County for Watauga County did not amount to an impermissible amendment of the indictment under subsection (e) of this section, as it did not alter the charge in the indictment. State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990).

Change of Date on Indictment. —

Trial court did not err in allowing State's oral motion to amend conspiracy indictments, where indictments initially charged that conspiracies occurred on or about May 6, 1987, through May 12, 1987, and amended indictments changed the time of the conspiracies to a period beginning on April 19, 1987, until May 12, 1987, as the conspiracy charges were not substantially altered by changing the dates recited in the indictments. State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989).

It was the fact that another felony was committed, not its specific date, which was the essential question in habitual felon indictment; therefore, because date alleged in indictment was neither an essential nor a substantial fact as to the charge of habitual felon, the trial court properly allowed the state to change a date in the habitual felon indictment. State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994).

Moving a Phrase. — Amendment to indictment which moved the phrase "a deadly weapon" was permissible because it did not substantially alter the charge in the original indictment and because the original indictment was sufficient to allege that the cell floor and bars were deadly weapons. State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994).

The change made in the indictment from "knife" to "firearm" did not alter the burden of proof or constitute a substantial change which would justify returning the indictment to the grand jury, and did not violate this section. State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991), cert. denied, 331 N.C. 120, 414 S.E.2d 764 (1992).

Change in Rape Indictment Permitted. — Where indictments alleged offense was committed against person of "Regina Lapish Foster" and indictment for rape used name "Regina Lapish," but at no time was defendant misled or surprised as to nature of charges against him, trial court did not err in allowing State to change rape indictment by substituting the name of "Regina Lapish Foster" for name of "Regina Lapish"; addition of alleged victim's last name to one of four indictments was not amendment as it did not substantially alter charge set forth in indictment. State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988), cert. denied, 328 N.C. 273, 400 S.E.2d 459 (1991).

Stated in State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

(a) A criminal pleading must contain:

(1) The name or other identification of the defendant but the name of the defendant need not be repeated in each count unless required for clarity.

(2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.

(3) A statement or cross reference in each count indicating that the offense charged therein was committed in a designated county.

(4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

(5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement.

(6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. Error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction.

(b) If any count of an indictment or information charges more than one offense, the defendant may by timely filing of a motion require the State to elect and state a single offense alleged in the count upon which the State will proceed to trial. A count may be dismissed for duplicity if the State fails to make timely election.

(c) In trials in superior court, allegations of previous convictions are subject to the provisions of G.S. 15A-928.

(d) In alleging and proving a prior conviction, it is sufficient to state that the defendant was at a certain time and place convicted of the previous offense, without otherwise fully alleging all the elements. A duly certified transcript of the record of a prior conviction is, upon proof of the identity of the person of the defendant, sufficient evidence of a prior conviction. If the surname of a defendant charged is identical to the surname of a defendant previously convicted and there is identity with respect to one given name, or two initials, or two initials corresponding with the first letters of given names, between the two defendants, and there is no evidence that would indicate the two defendants are not one and the same, the identity of name is prima facie evidence that the two defendants are the same person.

(e) Upon motion of a defendant under G.S. 15A-952(b) the court must dismiss the charges contained in a pleading which fails to charge the defendant with a crime in the manner required by subsection (a), unless the failure is with regard to a matter as to which an amendment is allowable.

(f) Upon motion of a defendant under G.S. 15A-952(b) the court may strike inflammatory or prejudicial surplusage from the pleading. (1973, c. 1286, s. 1; 1975, c. 642, s. 2; 1989, c. 290, s. 3.)

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Indictment Not Dispositive of Double Jeopardy Issue. — Indictments need only allege the ultimate facts constituting each element of the criminal offense; because a very detailed account is not necessary for legally sufficient indictments, examination of the indictments is not always dispositive on the issue of double jeopardy. State v. Rambert, 341 N.C. 173, 459 S.E.2d 510 (1995).

Where there was no error in the dates alleged, etc. —

Variance between allegation and proof as to time is not material where no statute of limitations is involved. State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (1994).

Short-form murder indictment which did not allege premeditation nor the elements of felony murder was held not defective. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

The State complied with the requirement of subdivision (a)(4) by stating the period of time during which the alleged offense occurred: the summer of 1986. State v. Reynolds, 93 N.C. App. 552, 378 S.E.2d 557 (1989).

Cases decided prior to the enactment of subdivision (a)(5) which held that an "indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony" are no longer controlling on this issue. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

In cases of sexual assaults on children, temporal specificity requisites diminish. Thus where child victim testified that defendant perpetrated rape and other sexual offenses against her on several occasions over a period of six years, and specifically recalled offenses occurring on September 27 and September 29, 1988, for both of which dates defendant presented an alibi, and where the difference between the testimony of the victim as to which offense occurred on which date did not prevent defendant from presenting his alibi, there was no error in letting the case go to the jury. State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (1994).

Indictment Held Sufficient. —

An indictment that alleged that larceny was committed "pursuant to a violation of G.S. 14-51" was in the language of § 14-72(b) and was sufficient to apprise defendant that he was charged with larceny punishable as a felony because it was committed pursuant to a burglary. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Indictment for first-degree burglary satisfied the requirements of subdivision (a)(5), even though it did not specify the felony the defendant intended to commit when he entered victim's apartment.

State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Indictment which alleged that defendant unlawfully and willfully did drive a vehicle on a street or highway while the driver's license issued to him had been permanently revoked was clearly sufficient to charge an offense in violation of § 20-28(b). State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995).

Applied in State v. Everett, 328 N.C. 72, 399 S.E.2d 305 (1991); State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993); State v. Hammond, 112 N.C. App. 454, 435 S.E.2d 798 (1993).

Cited in State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990); State v. Smith, 110 N.C. App. 119, 429 S.E.2d 425 (1993); State v. Barnes, 333 N.C. 666, 430 S.E.2d 223, cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993); State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300 (1993); State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), cert. denied, — U.S. —, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995).

§ 15A-925. Bill of particulars.

CASE NOTES

Election Between Legal Theories Not Required. —

Defendant was not prejudiced in the preparation of his defense and preparation for trial because indictment did not inform him as to whether he was being prosecuted for first or second degree murder. It is well settled in North Carolina that the State is not generally required to elect its theory of prosecution in a murder case before trial. Where a factual basis for the prosecution is sufficiently pleaded, the defendant must be prepared to defend against any and all theories which the facts may support. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Motion for Bill of Particulars Properly Denied. —

Short form indictments for first-degree rape and first-degree sexual offense satisfied the statutory requirements and provided defendant adequate notice of the alleged offenses; therefore, denial for bill of particulars was proper. State v. Stallings, 107 N.C. App. 241, 419 S.E.2d 586 (1992), discretionary review improvidently allowed, 333 N.C. 784, 429 S.E.2d 717 (1993).

Where the State introduced nothing at trial which could have come as a surprise to the defendant, and she had full knowledge of the specific occurrences to be investigated at trial, defendant failed to show that lack of access to information significantly impaired her preparation and conduct of the case. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Cited in State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988).

§ 15A-926. Joinder of offenses and defendants.

CASE NOTES

- I. General Consideration.
- II. Joinder of Offenses.
  - A. In General.
  - B. Illustrative Cases.
- III. Joinder of Defendants.
  - A. In General.
  - B. Illustrative Cases.

I. GENERAL CONSIDERATION.

Joinder Under This Section. — Subsection (a) of this section allows consolidation of separate offenses for trial when the offenses charged are "based on the same act or transaction or on a series of transactions connected together or constituting parts of a single scheme or plan." Subsection (b) similarly permits joinder of separate defendants for trial when the several offenses charged are transactionally related. This requirement is satisfied when the offenses in question all arose out of a single conspiracy. State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, appeal dismissed, cert. denied, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

In the context of joinder, the term "offense" means "indictment," even though the term is often used more generally to refer to the act or acts done by defendant which constitute a crime. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

Consolidation Is Within Discretion, etc. —

In accord with fifth paragraph in the main volume. See State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

When joinder is permissible under the statute, whether to sever trials or deny joinder is a question lodged within the discretion of the trial judge, whose rulings will not be disturbed on appeal unless it is demonstrated that joinder deprived defendant of a fair trial. State v. Ruffin, 90 N.C. App. 712, 370 S.E.2d 279 (1988).

Defendant's unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in allowing the motion to consolidate. State v. Ruffin, 90 N.C. App. 712, 370 S.E.2d 279 (1988).

Function of Appellate Review. —

The test applied on appellate review of a motion for joinder is whether the offenses were so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant. State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988).

Applied in State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Evans, 99 N.C. App. 88, 392 S.E.2d 441 (1990); State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992); State v. Roddey, 110 N.C. App. 810, 431 S.E.2d 245 (1993); State v. Hammond, 112 N.C. App. 454, 435 S.E.2d 798 (1993); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Quoted in State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993).

Cited in State v. Robey, 91 N.C. App. 198, 371 S.E.2d 711 (1988); State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Carter, 96 N.C. App. 611, 386 S.E.2d 620 (1989); State v. Estes, 99 N.C. App. 312, 393 S.E.2d 158 (1990); United States v. Blackwood, 913 F.2d 139 (4th Cir. 1990); State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992); State v. Howie, 116 N.C. App. 609, 448 S.E.2d 867 (1994); State v. Burton, 119 N.C. App. 625, 460 S.E.2d 181 (1995); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996).

II. JOINDER OF OFFENSES.

A. In General.

A trial court's ruling on joining cases for trial is discretionary, etc. —

Whether joinder of offenses is permissible under this section is a question addressed to the discretion of the trial court which will only be disturbed if the defendant demonstrates that joinder deprived him of a fair trial. State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993).

Commonality of Witness Not Required. — There is no requirement that there be a commonality of witnesses where two murder cases have been joined for trial. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, — U.S. —, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Transactional Connection Necessary for Joinder. —

Where the second murder in the case was committed to avoid detection for the first murder, the transactional connection supported the consolidation of all the charges for trial pursuant to this section. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where defendant was charged with murder and failure to appear for his murder trial, this connection was insufficient to satisfy the transactional requirement of this section. The joinder of these two crimes constituted harmless error. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

Joinder When Crimes Constitute "Fingerprint" of Perpetrator. — To be joined crimes must be transactionally related either as part of a single conspiracy, because they are closely related in time, or because similarities of the crime constitute a fingerprint of the perpetrator. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

B. Illustrative Cases.

Similarities in Crime Held "Fingerprint" of Perpetrator. — Where defendant was charged with causing his step child to suffer separate injuries consisting of a facial burn and a burn to the buttocks, both injuries were sustained at the same place, the family residence, there was evidence that both injuries were inflicted while defendant was taking care of his wife's sons, and in neither instance did the defendant seek medical treatment for the victim, there was ample evidence of similarities of the crimes constituting a fingerprint of the perpetrator. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Evidence Was Sufficient for Transactional Connection. — There was sufficient evidence of transactional connection to support joinder of two murder charges where common thread connecting crimes was defendant's need for cash to pay for his rent and other bills, and this need for money motivated him to begin his search for victims and led to eventual robberies and murders of two victims two days apart. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial court had discretion to consolidate charges of murder for trial, where the facts incident to the two murders revealed a common modus operandi and a temporal proximity sufficient to establish a transactional connection: both victims were young women with drug habits; defendant knew both and had smoked crack with each; one victim was nude when found, and the other was nude from the waist down; both victims suffered blunt-force injuries to their heads; one died as a result of strangulation, and the pathologist could not rule out the possibility that the other had also been strangled; the women were killed within two months of each other, and their bodies were found in the lowest part of vacant houses within two blocks of each other. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, — U.S. —, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Separate Charges of First-Degree Murder. —

Evidence of a transactional connection was sufficient to support joinder of homicide charges against defendant for first-degree murder of his mother-in-law and son, where the evidence showed that defendant saw his problems as interrelated and developed a unified solution thereto, and further, where the two crimes were so closely related in time that they appeared to be parts of a continuous criminal episode. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Consolidation of two murder charges did not deny defendant a fair determination on the issue of his insanity at the time of the killing of his son or on the issue of his lack of premeditation and deliberation at the time of the killing of his mother-in-law by having to present conflicting defenses in a single trial. Contrary to defendant's assertion, the evidence showed that defendant did not present insanity as to the homicide of his son and lack of premeditation and deliberation as to the homicide of mother-in-law. Rather, defendant presented two defenses on each charge, the defense of insanity and the defense of lack of premeditation and deliberation, and the issues were fairly presented for the jury's consideration. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Murder and Conspiracy to Commit Murder. — On appeal from convictions of murder and conspiracy to commit murder, defendants failed to show either prejudice or that one defendant's defense was so antagonistic as to require separate trials pursuant to this section. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Conspiracy. — The trial judge's joinder for trial of son's substantive trafficking offenses with mother's conspiracy offense did not deprive either of them of a fair trial. State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995).

The offenses of accessory after the fact of a felony and being an aider and abettor to that felony are joinable offenses for purposes of indictment and trial, even though a defendant cannot be convicted of both. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

Robbery of Motel Room Occupants. — Evidence that all three offenses took place within two months of each other at motels in Greensboro; all of the crimes occurred in the early morning hours; in each instance someone entered an occupied motel room by stealth while the occupants were asleep; in two cases, personal property was taken and the third was interrupted by the victim being awakened; and, in two cases, the victim identified the burglar as a young male wearing jogging pants and a baseball cap, who escaped on foot, was sufficient to establish a common scheme or plan to deprive motel occupants of their property while they were asleep. Thus, the trial court did not err in joining the three offenses for trial. State v. Cummings, 103 N.C. App. 138, 404 S.E.2d 496 (1991).

Embezzlement and False Pretenses. — While a defendant cannot be convicted of both embezzlement and false pretenses based upon a single transaction, the State may charge the defendant with both offenses. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Burglary, Robbery and Murder. — In prosecution for conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder, the defendant failed to show that the trial court abused its discretion in permitting joinder or that he was deprived of a fair trial, where the defendant's argument was based entirely on a statement made by the co-defendant during his sentencing hearing, and there was no way for the Supreme Court to determine whether the co-defendant would have testified in the same way or would have testified at all if the defendants had been given separate trials, nor could it know whether any possible testimony by the co-defendant would have had any effect on the outcome of the defendant's trial. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

First-Degree Sexual Offense and Taking Indecent Liberties with a Child. — Consolidation of two counts of first-degree sexual offense and two counts of taking indecent liberties with a child, which allegedly occurred one week apart, did not constitute error. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Where defendant was charged with four sexual offense violations and all four charges involve acts of sexual abuse by defendant upon the same victim in the same location, and each of the alleged acts occurred when defendant was alone with the victim, the trial judge did not abuse his discretion in refusing to sever for separate trial an indecent liberties charge, even though it was based upon acts that allegedly occurred more than six months after the alleged acts underlying the remaining three charges. State v. Bruce, 90 N.C. App. 547, 369 S.E.2d 95, cert. denied, 323 N.C. 367, 373 S.E.2d 549 (1988).

Indictments for first-degree sexual offenses were properly joined under this section; all the crimes were committed while the children were in the exclusive care of defendant while he was transporting them from their homes to a day care center; and returning them home in the afternoon, therefore, the defendant's conduct manifested a common scheme or plan. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Drug-Related Offenses. — Joinder of several drug-related offenses was not the product of arbitrary reasoning, since the transactions were closely related in time and nature under the circumstances. Additionally, defendant failed to point to any tangible evidence of prejudice which resulted from the joinder. State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993).

The trial court did not abuse its discretion and properly joined charges of knowingly keeping a dwelling for the purpose of keeping or selling controlled substances and possession of marijuana with intent to sell and deliver with the charge of selling marijuana to a minor. State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385, temporary stay granted, 338 N.C. 313, 450 S.E.2d 486 (1994).

III. JOINDER OF DEFENDANTS.

A. In General.

Choice Is for State, Not Defendant. — A defendant could not independently assert his preference for joinder with a codefendant. Under the statutory joinder structure, the choice is for the State, not a defendant. State v. Adams, 103 N.C. App. 158, 404 S.E.2d 708 (1991).

The statute specifically provides only for joinder of charges against two or more defendants, as distinguished from joinder of two or more charges against the same defendant, upon motion of the State. Thus, the statute provided no basis for a motion by defendant to compel joinder of his case for trial with that of his brother, even though both he and his brother were charged with the rape and kidnapping of the victim and their defenses were not antagonistic. State v. Jeune, 332 N.C. 424, 420 S.E.2d 406 (1992).

Trial Court's Ruling, etc. — The question of whether to allow a motion to join defendants for trial ordinarily is addressed to the sound discretion of the trial court; absent a showing that a defendant has been deprived of a fair trial by joinder, the trial court's discretionary ruling on the question will not be disturbed. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Timing and Form of Motions. — A written motion for joinder of defendants may be made at any time prior to trial; the motion need not be written if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Result Necessary to Show Prejudice. — Unless joinder of codefendants results in the admission of evidence harmful to the defendant which would not have been admissible in a severed trial, the defendant is not prejudiced by the joinder. State v. Lowry, 318 N.C. 54, 347 S.E.2d 729 (1986); State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Where each defendant was charged with accountability for the same offenses, joinder was permissible. State v. Ruffin, 90 N.C. App. 712, 370 S.E.2d 279 (1988).

B. Illustrative Cases.

Multiple charges of trafficking in cocaine through possession, manufacturing, and transportation, as well as conspiracy, are within the purview of this statute. State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

Possession with Intent to Sell Cocaine. — Where defendants were charged with identical crimes emanating from the same instance of wrongdoing, where the offenses charged were so connected in time and place that the evidence presented at trial was competent and admissible to both defendants, where the trial court instructed the jury that each defendant's case should be considered separate and apart from the other defendant's case, and where defendants had shown absolutely no prejudice resulting from the court's failure to sever their trials, there was no abuse of discretion by the trial court in refusing to separate the trial of defendants for possession with intent to sell more than 28 grams of cocaine. State v. Kite, 93 N.C. App. 561, 378 S.E.2d 588, appeal dismissed, 324 N.C. 579, 381 S.E.2d 778 (1989).

Defendant wife who married codefendant husband four days before their joint trial did not prevail in contention that trial should have been severed due to the couple's marriage and antagonistic defenses, where neither her brief nor the record revealed any such conflict. State v. Agubata, 94 N.C. App. 710, 381 S.E.2d 191 (1989).

Joinder of Married Defendants Upheld. — Where both of the defendants were charged with trafficking in heroin based on controlled substances found in the home they shared, joinder originally was consented to by both defendants through their prior counsel, joinder was made prior to the defendants' marriage to each other, and although defendant argued that he would tend to incriminate his wife by offering a defense that would implicate her as the owner of the controlled substances found by the police, defendant offered no such defense at trial, there was no error in trial court's decision to allow joinder. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

CASE NOTES

The trial court has three choices when a defendant objects to joinder due to the existence of an extrajudicial statement by a codefendant that makes reference to the objecting defendant but is not admissible as to the objecting defendant: 1) a joint trial at which the statement is not admitted; 2) a joint trial at which the statement is admitted in a sanitized form; or 3) a separate trial for the objecting defendant. State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992).

Review, etc. —

The question of whether to allow a motion to join defendants for trial ordinarily is addressed to the sound discretion of the trial court; absent a showing that a defendant has been deprived of a fair trial by joinder, the trial court's discretionary ruling on the question will not be disturbed. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Under this section, restrictions are placed on the use of a codefendant's statement only where a joint trial occurs; therefore, this statute did not apply to statements made by co-defendant and read in court by prosecution witness, since co-defendant was not jointly tried with defendant. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Under this section, restrictions are placed on the use of a codefendant's statement only where a joint trial occurs. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Showing of Prejudice, etc. —

Unless joinder of codefendants results in the admission of evidence harmful to the defendant which would not have been admissible in a severed trial, the defendant is not prejudiced by the joinder. State v. Lowry, 318 N.C. 54, 347 S.E.2d 729 (1986); State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

When Joint Trial Is Error. —

Where defendant's failure to testify in his own defense was based on the position taken by his codefendant rather than the position taken by the State and defendant was denied the opportunity to put on potentially inculpatory evidence against his codefendant, joinder was inappropriate. State v. Pickens, 335 N.C. 717, 440 S.E.2d 552 (1994).

When Statement Regarding Codefendant Inadmissible. — A statement is inadmissible as to a codefendant only if it is made outside his presence and incriminates him. State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992).

Defendant was not entitled to have his co-conspirators' incriminating statements sanitized pursuant to subdivision (c)(1) of this section where the statements are admissible against him under § 8C-1, Rule 801(d)(E) whether he is tried separately or jointly. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

The existence of antagonistic defenses will not, standing alone, warrant a severance. State v. Pickens, 335 N.C. 717, 440 S.E.2d 552 (1994).

Antagonistic defenses do not necessarily, etc. —

The existence of antagonistic defenses alone does not necessarily warrant severance; the focus is on whether the defendants have suffered prejudice, not on whether they contradict each other. State v. Burton, 119 N.C. App. 625, 460 S.E.2d 181 (1995).

Deletions from defendant's statement, etc. —

In accord with the main volume. See State v. Holmes, 101 N.C. App. 229, 398 S.E.2d 873 (1990).

The admission of co-defendant's confession with all references to defendant deleted was not prejudicial to defendant where the parts of co-defendant's confession about which defendant complained were of little importance to the case against defendant and the confession was largely corroborated by other evidence. State v. Littlejohn, 340 N.C. 750, 459 S.E.2d 629 (1995).

Defendants Charged with Same Crime. —

No error found in the denial of defendant's motion to sever his trial for sexual offenses and kidnapping from that of his codefendant. State v. Pendergrass, 111 N.C. App. 310, 432 S.E.2d 403 (1993).

Severance should be granted to avoid an evidentiary contest between defendants, etc. —

In determining whether trials should be severed, mere inconsistencies in defenses do not necessarily amount to the kind of antagonism between defendants joined for trial that deprives one or the other of a fair trial. Rather, the defenses must be so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty or so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants resulting in a spectacle where the State simply stands by and witnesses a combat in which the defendants attempt to destroy each other. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Defendant Waived Right to Severance. — Because defendant made his motion to sever at the first day of trial, he was required to renew his motion at the close of all of the evidence; therefore, where defendant failed to renew his motion at the close of all the evidence as required by this section, he waived his right to sever. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

The record and transcript indicated that the defendant failed to renew his motion to sever offenses at any time after his pretrial motion for same was denied. By statute, therefore, he waived any right to severance of offenses. State v. Spivey, 102 N.C. App. 640, 404 S.E.2d 23 (1991).

No Motion to Sever. — Defendant made no motion to sever and waived the right to allege on appeal that the trial court erred in joining the offenses for trial. State v. Mitchell, 104 N.C. App. 514, 410 S.E.2d 211 (1991), cert. granted, 331 N.C. 120, 414 S.E.2d 764 (1992), discretionary review improvidently granted, 336 N.C. 22, 442 S.E.2d 24 (1994).

Joinder Upheld. —

In prosecution for conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder, the defendant failed to show that the trial court abused its discretion in permitting joinder or that he was deprived of a fair trial, where the defendant's argument was based entirely on a statement made by the co-defendant during his sentencing hearing, and there was no way for the Supreme Court to determine whether the co-defendant would have testified in the same way or would have testified at all if the defendants had been given separate trials, nor could it know whether any possible testimony by the co-defendant would have had any effect on the outcome of the defendant's trial. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Defendant failed to show any prejudice or an abuse of discretion by the judge's failure to sever cases against him for first degree sexual offenses for trial, where, although defendant argued consolidation made the case difficult to defend and tended to make the jury believe he was guilty of all offenses simply because there were so many, the fact remained that if the cases were tried separately the State could still have presented evidence of other similar sex crimes as evidence of a common scheme or plan. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Where testimony regarding defendant's statement to police, the only evidence which could be deemed prejudicial to defendant, was properly elicited by the State at defendant's consolidated trial, and could have been properly elicited by the State if defendant had been tried alone, and the evidence against codefendant was weak and resulted in her acquittal, defendant could not contend that his association with codefendant prejudiced the jury against him. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

Joinder Held Error. — Where defendants were being jointly tried for the same capital offense when one defendant changed his plea to guilty, it was error for the trial to continue as both a sentencing proceeding as to one defendant and as a trial to determine the guilt or innocence of the other. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

Given the conflict in defendants' respective positions at trial and the other evidence in the case, including the paucity of evidence on acting in concert, defendants were denied a fair trial by being tried together. State v. Pickens, 335 N.C. 717, 440 S.E.2d 552 (1994).

Applied in State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988); State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Winslow, 97 N.C. App. 551, 389 S.E.2d 436 (1990); State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992);

Newell v. Nationwide Mut. Ins. Co., 334 N.C. 391, 432 S.E.2d 284 (1993); State v. Floyd, 115 N.C. App. 412, 445 S.E.2d 54 (1994); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996).

Quoted in State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Cited in State v. Styles, 116 N.C. App. 479, 448 S.E.2d 385, temporary stay granted, 338 N.C. 313, 450 S.E.2d 486 (1994).

§ 15A-928. Allegation and proof of previous convictions in superior court.

CASE NOTES

I. General Consideration.
II. Stipulation of Previous Convictions.

I. GENERAL CONSIDERATION.

The purpose of this section, etc. — The purpose of this section is to insure that the defendant is informed of the previous convictions the State intends to use and is given a fair opportunity to either admit or deny them or remain silent. State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

If there is no doubt that defendant was fully aware of the charges against him and was in no way prejudiced by the omission of the arraignment required by subsection (c) of this section, the trial court's failure to arraign defendant is not reversible error. State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

Prior Offense Was Required Before Higher Penalty Could Be Imposed. — Where the indictment did not charge defendant with a conviction for a prior offense and the State did not prove a prior conviction, the case was remanded for a new sentence hearing since both are required before the higher penalty can be imposed. State v. Williams, 93 N.C. App. 510, 378 S.E.2d 216 (1989).

Special Indictment. — When the State attempted to elevate a misdemeanor charge of breaking into a coin-operated machine to felony status, a special indictment charging defendant as being an habitual felon, based in part on an alleged prior conviction for feloniously breaking into a coin-operated machine, could not serve as a substitute for the special indictment required under this section. State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (1993).

II. STIPULATION OF PREVIOUS CONVICTIONS.

Effect of Failure to Arraign Where Defendant Stipulates to Charges. — Fact that the trial court did not formally arraign defendant upon charge alleging previous convictions of habitual impaired driving and did not advise defendant that he could admit the previous convictions, deny them, or remain silent, as required by subsection (c) of this section, was not reversible error where defendant stipulated to his previous convictions. State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

Relief precluded. — Where no fatal variance was shown between the indictment for felonious habitual impaired driving and proof at trial, since defendant's counsel stipulated to previous convictions as set out in the indictment, defendant failed to show that he was entitled to any relief with regard to the indictment. State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995).

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

(a) Except as provided in G.S. 20-138.4, the prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.

(b) No statute of limitations is tolled by charges which have been dismissed pursuant to this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1983, c. 435, s. 5; 1991, c. 109, s. 1.)

Legal Periodicals. — For note, "Double Jeopardy — When Does Jeopardy Attach in a Non-Jury Trial in North Carolina? — State v. Brunson," see 13 Campbell L. Rev. 123 (1990).

CASE NOTES

Judicial Authority Is Not Infringed. — Because the ultimate authority over managing the trial calendar is retained in the court, it cannot be said that this statute infringes upon the court's inherent authority or vests the district attorney with judicial powers in violation of the separation of powers clause. Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994).

When Double Jeopardy Attaches in Bench Trial. — In a bench trial, double jeopardy does not attach until the introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989), aff'd, 327 N.C. 244, 393 S.E.2d 860 (1990).

In a bench trial in district court where dismissal was taken to avert the necessity of introducing evidence rather than after its introduction, double jeopardy had not attached; jeopardy will attach only after introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989).

Cited in State v. Brunson, 327 N.C. 244, 393 S.E.2d 860 (1990); State v. Goodson, 101 N.C. App. 665, 401 S.E.2d 118 (1991).

§ 15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement.

(a) The prosecutor may enter a dismissal with leave for nonappearance when a defendant:

(1) Cannot be readily found to be served with an order for arrest after the grand jury had indicted him; or

(2) Fails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found.

(a1) The prosecutor may enter a dismissal with leave pursuant to a deferred prosecution agreement entered into in accordance with the provisions of Article 82 of this Chapter.

(b) Dismissal with leave for nonappearance or pursuant to a deferred prosecution agreement results in removal of the case from the docket of the court, but all process outstanding retains its validity, and all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of nontestimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like.

(c) The prosecutor may enter the dismissal with leave for nonappearance or pursuant to a deferred prosecution agreement orally in open court or by filing the dismissal in writing with the clerk. If the dismissal for nonappearance or pursuant to a deferred prosecution agreement is entered orally, the clerk must note the nature of the dismissal in the case records.

(d) Upon apprehension of the defendant, or in the discretion of the prosecutor when he believes apprehension is imminent, the prosecutor may reinstitute the proceedings by filing written notice with the clerk.

(e) If the defendant fails to comply with the terms of a deferred prosecution agreement, the prosecutor may reinstitute the proceedings by filing written notice with the clerk. (1977, c. 777, s. 1; 1985, c. 250; 1994, Ex. Sess., c. 2, s. 1.)

Editor's Note. — Session Laws 1994, Extra Session, c. 2, s. 1, which amended this section, was effective March 1, 1994, and applicable to deferred prosecution agreements entered into on or after that date.

CASE NOTES

Noncompliance with Section Does Not Result in "Failure of Pleading To State an Offense." — Subsection (d), which provides for reinstatement of an indictment after a dismissal with leave is taken, is not "jurisdictional" in nature, nor does failure to strictly comply with its requirements result in the "failure of the pleading to charge an offense" within the meaning of § 15A-952(d). Instead, the dismissal with leave contemplated in this subsection is a procedural calendaring device. State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

ARTICLE 51.

Arraignment.

§ 15A-941. Arraignment before judge only upon written request; use of two-way audio and video transmission; entry of not guilty plea if not arraigned.

(a) Arraignment consists of bringing a defendant in open court or as provided in subsection (b) of this section before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty.

(b) An arraignment in a noncapital case may be conducted by an audio and video transmission between the judge and the defendant in which the parties can see and hear each other. If the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding.

(c) Prior to the use of audio and video transmission pursuant to subsection (b) of this section, the procedures and type of equipment for audio and video transmission shall be submitted to the Administrative Office of the Courts by the senior regular resident superior court judge for the judicial district or set of districts and approved by the Administrative Office of the Courts.

(d) A defendant will be arraigned in accordance with this section only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment. If a bill of indictment is not required to be served pursuant to G.S. 15A-630, then the written request for arraignment must be filed not later than 21 days from the date of the return of the indictment as a true bill. Upon the return of the indictment as a true bill, the court must immediately cause notice of the 21-day time limit within which the defendant may request an arraignment to be mailed or otherwise given to the defendant and to the defendant's counsel of record, if any. If the defendant does not file a written request for arraignment, then the court shall enter a not guilty plea on behalf of the defendant.

(e) Nothing in this section shall prevent the district attorney from calendaring cases for administrative purposes. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1993, c. 30, s. 3; 1995 (Reg. Sess., 1996), c. 725, s. 7.)

Editor's Note. — Session Laws 1993, c. 30, s. 3, which amended this section, became effective April 22, 1993 and applied to proceedings occurring on or after that date.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to offense committed on or after that date, in the catchline, inserted "only upon written request" following "judge", and added "entry of not guilty plea if not arraigned" to the end; and added subsections (d) and (e).

CASE NOTES

Stated in State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

Cited in State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

§ 15A-942. Right to counsel.

If the defendant appears at the arraignment without counsel, the court must inform the defendant of his right to counsel, must accord the defendant opportunity to exercise that right, and must take any action necessary to effectuate the right. If the defendant does not file a written request for arraignment, the court, in addition to entering a plea of not guilty on behalf of the defendant, shall also verify that the defendant is aware of the right to counsel, that the defendant has been given the opportunity to exercise that right, and must take any action necessary to effectuate that right on behalf of the defendant. (1777, c. 115, s. 85, P.R.; R.C., c. 35, s. 13; Code, s. 1182; Rev., s. 3150; C.S., s. 4515; 1973, c. 1286, s. 1; 1995 (Reg. Sess., 1996), c. 725, s. 8.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to offense committed on or after that date, added the second sentence.

CASE NOTES

Failure to Inform Defendant Represented by Counsel of Right Thereto Not Prejudicial. — Although defendant argued that it did not appear that he was ever advised of his right to counsel pursuant to this section, where it was clear from the record that defendant was represented by counsel, he could not claim that he was prejudiced by not being informed of such right. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Quoted in State v. Jones, 342 N.C. 523, 467 S.E.2d 12 (1996).

§ 15A-943. Arraignment in superior court — Required calendaring.

CASE NOTES

I. General Consideration.
III. Trial Date Where Defendant Pleads Not Guilty.

I. GENERAL CONSIDERATION.

Cited in State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993).

III. TRIAL DATE WHERE DEFENDANT PLEADS NOT GUILTY.

But Defendant May Waive Right. — Where defendant failed to assert his right not to be tried in the week in which he was arraigned by seeking a continuance of his trial, he waived this statutory right. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Article 52.

Motions Practice.

§ 15A-951. Motions in general; definition, service, and filing.

CASE NOTES

Motion to Vacate Necessary to Void Order Issued Without Notice. — While subsection (b) of this section requires that each written motion be served upon the attorney of record of the opposing party or upon the defendant if he is not represented by counsel, an order issued without notice where actual notice is required is irregular and thus voidable, but not void, and it stands until set aside by a motion to vacate. It could not be attacked collaterally under the Speedy Trial Act. State v. Melvin, 99 N.C. App. 16, 392 S.E.2d 740 (1990).

A written motion for joinder of defendants may be made at any time prior to trial; the motion need not be written if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

(a) Any defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion.

(b) Except as provided in subsection (d), when the following motions are made in superior court they must be made within the time limitations stated in subsection (c) unless the court permits filing at a later time:

(1) Motions to continue.
(2) Motions for a change of venue under G.S. 15A-957.
(3) Motions for a special venire under G.S. 9-12 or G.S. 15A-958.

(4) Motions to dismiss under G.S. 15A-955.
(5) Motions to dismiss for improper venue.
(6) Motions addressed to the pleadings, including:
  a. Motions to dismiss for failure to plead under G.S. 15A-924(e).
  b. Motions to strike under G.S. 15A-924(f).
  c. Motions for bills of particulars under G.S. 15A-924(b) or G.S. 15A-925.
  d. Motions for severance of offenses, to the extent required by G.S. 15A-927.
  e. Motions for joinder of related offenses under G.S. 15A-926(c).

(c) Unless otherwise provided, the motions listed in subsection (b) must be made at or before the time of arraignment if a written request is filed for arraignment and if arraignment is held prior to the session of court for which the trial is calendared. If arraignment is to be held at the session for which trial is calendared, the motions must be filed on or before five o'clock P.M. on the Wednesday prior to the session when trial of the case begins.

If a written request for arraignment is not filed, then any motion listed in subsection (b) of this section must be filed not later than 21 days from the date of the return of the bill of indictment as a true bill.

(d) Motions concerning jurisdiction of the court or the failure of the pleading to charge an offense may be made at any time.

(e) Failure to file the motions in subsection (b) within the time required constitutes a waiver of the motion. The court may grant relief from any waiver except failure to move to dismiss for improper venue.

(f) When a motion is made before trial, the court in its discretion may hear the motion before trial, on the date set for arraignment, on the date set for trial before a jury is impaneled, or during trial.

(g) In superior or district court, the judge shall consider at least the following factors in determining whether to grant a continuance:
(1) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;
(2) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation; and
(3) Whether the case involves physical or sexual child abuse when a victim or witness is under 16 years of age, and whether further delay would have an adverse impact on the well-being of the child.
(4) Good cause for granting a continuance shall include those instances when the defendant, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly. (1973, c. 1286, s. 1; 1989, c. 688, s. 5; 1995 (Reg. Sess., 1996), c. 725, s. 9.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to offense committed on or after that date, in subsection (c), inserted "if a written request is filed for arraignment and" in the first sentence of the first paragraph, and added the second paragraph.

CASE NOTES

I. General Consideration.
II. Motions to Continue.
III. Motions to Dismiss.
V. Time for Making Motions.

I. GENERAL CONSIDERATION.

Noncompliance with Requirements of § 15A-932 Does Not Result in "Failure of Pleading To State an Offense." — Section 15A-932(d), which provides for reinstatement of an indictment after a dismissal with leave is taken, is not "jurisdictional" in nature, nor does failure to strictly comply with its requirements result in the "failure of the pleading to charge an offense" within the meaning of subsection (d) of this section. Instead, the dismissal with leave contemplated in § 15A-932(b) is a procedural calendaring device. State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

Failure to Object to Selection of Grand Jury Foreman. — Capital murder defendant waived any claim that his constitutional rights were denied because of racial discrimination in selection of foreman to the grand jury that indicted him, where the defendant made no motion challenging any aspect of the indictment and only raised the issue for the first time on appeal. State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990).

Applied in State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (1993); State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993).

Cited in Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683, 502 U.S. 1007, 112 S. Ct. 644, 116 L. Ed. 2d 661 (1991); State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991).

II. MOTIONS TO CONTINUE.

Review of Action on Motion Involving Constitutional Issue. — When a motion for a continuance raises a constitutional issue and is denied, the denial is grounds for a new trial only when the defendant shows that the denial was erroneous and also that his case was prejudiced as a result of the error. State v. Bunch, 106 N.C. App. 128, 415 S.E.2d 375, cert. denied, 332 N.C. 149, 419 S.E.2d 575 (1992); State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

Defendant Must Show Error and Prejudice for New Trial. — Even assuming that the trial court erred in denying his motion for a continuance, defendant failed to show any prejudicial error. Defendant's mere intangible hope that something helpful may have turned up in a transcript from a prior trial did not afford him a basis for delaying trial. State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

Motion Not Supported by Proof of Sufficient Grounds Properly Denied. — A trial judge should not grant a continuance unless the reasons therefor are fully established. Therefore, an affidavit showing sufficient grounds should be filed in support of a motion to continue. State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

Denial of Motion Held Proper. — Trial court did not abuse its discretion in denying defendant's motion to continue trial where counsel had approximately 55 days to prepare for trial and neither defense counsel nor defendant asserted that they expected to present any witnesses on defendant's behalf or that defendant intended to testify. State v. Bunch, 106 N.C. App. 128, 415 S.E.2d 375, cert. denied, 332 N.C. 149, 419 S.E.2d 575 (1992).

Specific Findings of Fact Not Required. — Where the facts presented in defendant's motion were not in dispute, the judge was not required to make specific findings of fact in denying defendant's motion for a continuance. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

III. MOTIONS TO DISMISS.

Motion to Dismiss an Indictment When There Is Ground for Challenge to the Array. — Motion to quash a murder indictment on the basis of racial discrimination in the selection of the grand jury foreman is deemed a motion to dismiss an indictment based on a challenge to the array under § 15A-955(1) because it in effect challenges the grand jury which indicted the defendant, and under this section it must be made within the time limitations stated in subsection (c) unless the court permits filing at a later time. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

V. TIME FOR MAKING MOTIONS.

Written and Oral Motions for Joinder. — A written motion for joinder of defendants may be made at any time prior to trial; the motion need not be written if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

§ 15A-953. Motions practice in district court.

CASE NOTES

Cited in State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993).

§ 15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

CASE NOTES

I. General Consideration.
II. Speedy Trial.
  B. Pre-indictment Delay.
III. Flagrant Violation of Constitutional Rights.
IV. Unconstitutionality of Statute on Face or as Applied.
V. Double Jeopardy.
VI. Previous Adjudication of Issue.

I. GENERAL CONSIDERATION.

Applied in State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360 (1989).

Cited in State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); State v. Agee, 93 N.C. App. 346, 378 S.E.2d 533 (1989); State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993).

II. SPEEDY TRIAL.

B. Pre-indictment Delay.

Prejudice Not Presumed by Long Pre-indictment Delay. —

Passage of time is inherent in any preindictment delay situation, and prejudice is not presumed simply upon a showing of a lengthy preindictment delay. State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994), overruled, State v. Patton, 342 N.C. 633, 466 S.E.2d 708 (1996).

III. FLAGRANT VIOLATION OF CONSTITUTIONAL RIGHTS.

Denial of access of a witness to a breathalyzer test when the State's sole evidence of the offense of driving while impaired was the personal observation of the authorities would constitute a flagrant violation of defendant's constitutional right to obtain witnesses under N.C. Const., Art. I, § 23 as a matter of law and would require that the charges be dismissed. State v. Ferguson, 90 N.C. App. 513, 369 S.E.2d 378, cert. denied, 323 N.C. 367, 373 S.E.2d 551 (1988).

No Grounds Warranting Dismissal. — Although defendant argued that magistrate failed to inquire into all of the statutory considerations before setting the conditions of his pretrial release, there was no basis in the case to suggest that defendant was denied access to anyone; he was allowed to attempt to call an attorney, and was allowed to call his wife from the jail only minutes after he asked to do so in the magistrate's office; therefore, there was no violation of defendant's constitutional rights which would warrant dismissal of the charges against him. State v. Eliason, 100 N.C. App. 313, 395 S.E.2d 702 (1990).

IV. UNCONSTITUTIONALITY OF STATUTE ON FACE OR AS APPLIED.

Selective Prosecution of Tax Evaders. — The prosecution of individuals who publicly assert privileges not to pay taxes does not necessarily constitute selection for prosecution upon an impermissible basis. Such prosecutions, predicated in part upon a potential deterrent effect, serve a legitimate interest in promoting more general tax compliance. State v. Davis, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

V. DOUBLE JEOPARDY.

When Double Jeopardy Attaches in Bench Trial. — In a bench trial, double jeopardy does not attach until the introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989), aff'd, 327 N.C. 244, 393 S.E.2d 860 (1990).

In a bench trial in district court where dismissal was taken to avert the necessity of introducing evidence rather than after its introduction, double jeopardy had not attached; jeopardy will attach only after introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989), aff'd, 327 N.C. 244, 393 S.E.2d 860 (1990).

VI. PREVIOUS ADJUDICATION OF ISSUE.

Common Law Collateral Estoppel Codified. — Subdivision (a)(7) is a codification of the common law principle of collateral estoppel as it is applied in criminal cases. State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Indictment Barred by Collateral Estoppel. — State's first indictment of defendant, charging manslaughter of "a natureless living female fetus...," was dismissed for failure to allege a material element of manslaughter (that is, that defendant did kill another living human being), and the State did not appeal; therefore, collateral estoppel barred the State's second indictment for manslaughter, alleging that defendant did "kill and slay a living human being...," which referred to the same victim and incident. State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

First Indictment Accurate Enough to Inform and Protect Defendant from Second Indictment. — Whether defendant was indicted for manslaughter of a fetus, as the victim was described in the first indictment, or an unborn child, as the victim was described in the second indictment, the crime alleged was the same; therefore, the wording of the first indictment was accurate enough to inform defendant of the charge against him, and precise enough to protect him from the second indictment on what amounted to the same charge. State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Not Applicable to Federal Proceeding. — Subsection (a)(7) was not applicable where the State of North Carolina was not a party to the federal criminal proceeding, nor was any showing made that the state was in privity with the federal government in prosecuting the defendant on the federal drug charges. State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994).

§ 15A-955. Motion to dismiss — Grounds applicable to indictments.

CASE NOTES

"All of the Witnesses" Construed. — The trial court did not err in denying defendant's motion to dismiss indictment for conspiracy to commit trafficking in cocaine on the grounds that it was based upon allegedly perjured testimony because, assuming arguendo that the testimony was perjured and that it could have rendered a grand jury witness incompetent to testify within the meaning of subsection (3), this could not be said to satisfy the requirement that "all of the witnesses" were incompetent to testify before the grand jury. State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (1993).

Motion Must Be Made at or Before Time of Arraignment. —

Motion to quash a murder indictment on the basis of racial discrimination in the selection of the grand jury foreman is deemed a motion to dismiss an indictment based on a challenge to the array under subdivision (1) of this section because it in effect challenges the grand jury which indicted the defendant, and under § 15A-952 it must be made within the time limitations stated in 15A-952(c) unless the court permits filing at a later time. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Challenge to the Grand Jury Array. — The trial court, upon defendant's motion, may dismiss an indictment when there is ground for a challenge to the grand jury array; this motion must be made at or before the arraignment or it is waived. State v. Kirkland, 119 N.C. App. 185, 457 S.E.2d 766 (1995), aff'd, 342 N.C. 891, 467 S.E.2d 242 (1996).

Cited in Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683, 502 U.S. 1007, 112 S. Ct. 644, 116 L. Ed. 2d 661 (1991).

§ 15A-957. Motion for change of venue.

CASE NOTES

The test for whether a change of venue should be granted is whether the defendant has established that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial, and would be unable to remove from their minds any preconceived impressions they might have formed. State v. Scarborough, 92 N.C. App. 422, 374 S.E.2d 620 (1988), reversed on other grounds, 324 N.C. 542, 379 S.E.2d 857 (1989).

The defendant must demonstrate that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information, either through the media or by word of mouth, rather than upon the evidence presented at trial, and would therefore be unable to remove from their minds any preconceived impressions they might have formed. State v. King, 326 N.C. 662, 392 S.E.2d 609 (1990).

Pretrial Publicity. — Standing alone, evidence of pretrial publicity does not establish a reasonable likelihood that a fair trial cannot be had. State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992).

Burden of Showing Prejudice on Defendant. —

The burden of proof in a hearing on a motion for a change of venue due to existing prejudice in the county in which a prosecution is pending is upon the defendant. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

The burden is on the defendant to show that pretrial publicity precluded him from receiving a fair trial and, in meeting that burden, he must show that jurors had prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury. State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991).

Defendant failed to meet his burden of proving that pretrial publicity tainted his chances of receiving a fair and impartial trial. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, — U.S. —, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

And That Verdict Likely, etc. —

In accord with first paragraph in the main volume. See State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

What Defendant Must Show to Establish, etc. —

Where a jury has been selected to try the defendant and the defendant has been tried, the defendant must prove the existence of an opinion in the mind of a juror who heard his case that will raise a presumption of partiality. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Statements by Jurors That Pretrial Publicity Would Not Affect Verdict. —

Where each juror stated unequivocally that he could set aside what he had heard previously about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, defendant failed to establish an abuse of discretion by the trial court in refusing to grant a change of venue. State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992).

Evidence of Existing Community Prejudice. — The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective juror's responses to questions during the jury selection process. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Opinion Testimony as to Fair Trial Not Determinative. — Although opinion testimony of members of the community in which the defendant is to be tried as to whether the defendant can receive a fair trial may, in proper circumstances, be relevant and admissible, such evidence is not determinative on the question. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Factual News Accounts. —

Where pretrial newspaper articles were found to be factual and devoid of any prejudicial speculations or characterizations, and the record disclosed that defendant had not exhausted his peremptory challenges nor that any juror had prior knowledge of the case, the trial judge did not abuse his discretion in denying defendant's motion for a change of venue. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

If the defendant shows only the publicity consists of factual, noninflammatory news stories, denial of a motion for change of venue is proper. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Defendant failed to meet his burden of proving that pretrial publicity tainted his chances of receiving a fair and impartial trial, where newspaper articles which appeared in local and state newspapers and short news segments on television were primarily factual accounts of the murder of victim and the arrest of defendant. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, — U.S. —, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

General Newspaper Coverage of Case. —

Assault defendant claiming negative pretrial publicity on the basis of one newspaper article failed to show that trial judge abused his discretion in denying defendant's motion for change of venue; defendant failed to show that the article intimated he was guilty or that any juror was even aware of the article's existence. State v. Shubert, 102 N.C. App. 419, 402 S.E.2d 642 (1991).

As to findings of facts and the totality of the circumstances justifying trial judge to transfer venue in a sexual offense case involving children, see State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Denial of Motion Held Proper. —

Where there was no evidence of the effect of news reports on the residents of the county in which the trial was held, and five jurors had no prior knowledge of the case, five had read something about it, two had heard it discussed and all stated unequivocally that they could make their decisions unaffected by anything they had heard or read, the trial court's denial of defendant's motion for a change of venue would not be disturbed. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where, among other things, defendant neither alleged nor proved that information in the media was inaccurate or untrue, defendant did not demonstrate that it was likely that the jurors would improperly base their decisions on any pretrial evidence of which they were aware, he produced no evidence on the circulation of newspapers containing articles about him, there was no evidence of how the articles had impacted on the community's opinion of him, and he presented no evidence showing how the comments of a prospective jury member tainted the opinions of the other members as alleged, there was no ground for reversing the lower court's decision denying defendant's motion for change of venue. State v. Scarborough, 92 N.C. App. 422, 374 S.E.2d 620 (1988), rev'd on other grounds, 324 N.C. 542, 379 S.E.2d 857 (1989).

Where jurors who served in defendant's trial all indicated unequivocally that they would decide the case based on the evidence at trial and had not formed an impression or preconceived opinion about the guilt or innocence of the defendant, and where defendant made no other showing of identifiable prejudice, denial of defendant's motion for change of venue was not error. State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989).

Trial court did not abuse its discretion either by concluding that the defendant had failed to rebut the presumption of juror impartiality, or by denying the defendant's motion for a change of venue, where court asked prospective juror whether they had read or heard about defendant's case before coming to court and whether they had formed opinions which would make them partial, and where prospective jurors who stated that they had formed opinions or that they could not give defendant fair and impartial trial were summarily excused by trial court. Further, defendant excused peremptorily six of the first 12 jurors who stated that they knew nothing about the case and all five actual jurors who had heard or read about the case stated unequivocally that they formed no opinions about the case and would base their decisions solely on evidence presented at trial. State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991).

Defendant failed to demonstrate that it is reasonably likely that the jurors based their decision upon pretrial information rather than the evidence presented at trial and thus, the trial court did not abuse its discretion in denying defendant's motion for change of venue or special venire. State v. Pendergrass, 111 N.C. App. 310, 432 S.E.2d 403 (1993).

Trial court's denial of defendant's motion for a change of venue was upheld. State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993).

Where, to assure a fair and impartial venire, the trial court permitted individual voir dire of prospective jurors to discuss pretrial publicity, defendant did not establish a reasonable likelihood that pretrial publicity prevented him from receiving a fair and impartial trial, and the trial court did not err in denying defendant's motion for a change of venue. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, — U.S. —, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

While a number of the prospective jurors questioned indicated they had read or heard of the crime, and each juror who actually served on the jury stated unequivocally that he or she had formed no opinion about the case, could be fair and impartial, and would decide the issues based solely upon the evidence presented at trial, the trial court did not err in denying defendant's motion for a change of venue. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, — U.S. —, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Defendant failed to meet his burden of showing that pretrial publicity precluded him from receiving a fair and impartial trial where newspaper articles submitted in support of his motion for change of venue were factual in nature related to the facts of the crimes, defendant's arrest, his subsequent escape attempt, and a petition circulated by the family of one of the victims seeking a speedy disposition of defendant's trial; none of these articles was shown to be inflammatory or biased against defendant. State v. Gregory, 341 N.C. 365, 459 S.E.2d 638 (1995).

Applied in State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992).

Quoted in State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994); State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995).

Cited in State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

§ 15A-958. Motion for a special venire from another county.

CASE NOTES

Pretrial Publicity by Itself Insufficient. — The existence of pretrial publicity by itself does not establish a reasonable likelihood that defendant cannot receive a fair trial in the county where the crime was committed. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

As to findings of facts and the totality of the circumstances justifying trial judge to transfer venue in a sexual offense case involving children, see State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

The potential jurors' responses to questions on voir dire are the best evidence of whether pretrial publicity was prejudicial or inflammatory; if each juror states unequivocally that he or she can set aside pretrial information about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, the trial court does not err in refusing to grant a change of venue. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Denial of Motion Upheld. — Where all of the jurors selected to hear the case stated unequivocally that they had formed no opinions about the matter and would base their decision solely on the evidence presented, in light of such evidence, the trial court did not abuse its discretion by denying defendant's motion for a special venire from another county. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Trial court did not err in concluding that defendant failed to meet his burden of proving that pretrial publicity prevented his receiving a fair and impartial trial where each prospective juror was examined in detail during voir dire were asked whether they had heard or read about defendant's case and whether they had formed any opinions and some jurors were excluded. State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995).

Cited in State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992); State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

Legal Periodicals. —

For note on the battered woman syndrome, see 11 Campbell L. Rev. 263 (1989).

For article, "Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent," see 68 N.C.L. Rev. 763 (1990).

For comment discussing reform of insanity defense in North Carolina, "Insanity Defense: Should the Shock of the *Hayes* Verdict Compel North Carolina to Fix What 'Ain't Broke'?," see 25 Wake Forest L. Rev. 547 (1990).

CASE NOTES

Notice of Alibi Not Required by Section. — In enacting this section, which requires notice of the defense of insanity, the General Assembly removed language that would have required notice of alibi as well. State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

Burden of Proof Is on Defendant. — Although doctors testified that in their opinion the defendant did not know right from wrong in regard to the acts at issue in defendant's trial for first degree murder, a police officer testified the defendant had "very normal" demeanor and that she appeared to be oriented to time and was responsive to questions; therefore, since the burden was on the defendant to prove insanity, the jury did not have to believe the expert witnesses, and the evidence supported the verdicts, it was not error to refuse to set them aside. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

Instruction Misstated the Law. — Where the prosecuting attorney by his argument implied that the defendant could have pled not guilty by reason of insanity and the State would not have had to prove all the elements of the crime, this was an incorrect statement of the law. A criminal defendant may only plead not guilty, guilty or no contest; if a defendant pleads not guilty he may raise the defense of insanity by filing a pretrial motion that he intends to rely on that defense. State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993).

Cited in State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-971. Definitions.

CASE NOTES

Cited in State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

Legal Periodicals. — For note, "North Carolina Adopts the Inevitable Discovery Exception to the Exclusionary Rule: — State v. Garner," see 15 Campbell L. Rev. 305 (1993).

CASE NOTES

I. General Consideration.
II. Constitutionally Required Exclusion.
III. Substantial Violation of Chapter.

I. GENERAL CONSIDERATION.

Requirements of Motion to Dismiss. — A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made. While an affidavit is not required for a motion timely made at trial, the defendant must, however, specify that he is making a motion to suppress and request a voir dire. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Typographical Error in Affidavit Supporting Search Warrant. — Although affidavit in support of search warrant made a single reference to the "the Schedule II controlled substance marijuana" instead of cocaine, the trial court determined this was a typographical error and the warrant was still valid. State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995).

Motion to Suppress Granted. — Where police broke their promise not to prosecute the defendant as a habitual offender if he confessed, on which defendant detrimentally relied in giving a confession, the defendant was entitled to suppression of his confession and a new trial. State v. Sturgill, 121 N.C. App. 629, 469 S.E.2d 557 (1996).

Motion to Suppress Properly Denied. — Where there were unnecessary delays in taking defendant before a judicial official and in advising him of his right to communicate with counsel and friends, but the defendant did not argue a causal connection between the violations of § 15A-501(2) and (5) and his incriminating statements, the trial court properly denied suppressing the statements under subsection (2) of this section. State v. Jones, 112 N.C. App. 337, 435 S.E.2d 574 (1993).

There was competent evidence to support the trial court's findings of fact that search warrant was on the premises when the police entered defendant's residence and that it was read to his fiancee before any search was undertaken in the house; the trial court did not err in concluding that the execution of the search warrant did not violate any provisions of chapter 15A and in admitting at trial the evidence obtained as a result of the search of defendant's residence. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Where the evidence at issue was not obtained as a consequence of any violations of chapter 15A, and no causal relationship between any such violations and the evidence sought to be suppressed existed, the evidence at issue was not required to be suppressed pursuant to this statute. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Denial of Motion to Suppress Improper. — Search of the defendant's person was conducted in violation of the right of the defendant to be free from any unreasonable searches as guaranteed by the Fourth Amendment to the U.S. Constitution, the North Carolina Constitution, and this section. Accordingly, the order denying defendant's motion to suppress was reversed and the judgment entered upon defendant's plea of guilty was vacated. State v. Pittman, 111 N.C. App. 808, 433 S.E.2d 822 (1993).

Applied in State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Gwyn, 103 N.C. App. 369, 406 S.E.2d 145 (1991); State v. Austin, 111 N.C. App. 590, 432 S.E.2d 881 (1993); State v. Johnston, 115 N.C. App. 711, 446 S.E.2d 135 (1994).

Cited in State v. Barnhardt, 92 N.C. App. 94, 373 S.E.2d 461 (1988); State v. Beam, 325 N.C. 217, 381 S.E.2d 327 (1989); State v. Davis, 97 N.C. App. 259, 388 S.E.2d 201 (1990); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. O'Kelly, 98 N.C. App. 265, 390 S.E.2d 717 (1990); State v. Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992); State v. McLean, 120 N.C. App. 838, 463 S.E.2d 826 (1995).

II. CONSTITUTIONALLY REQUIRED EXCLUSION.

Where defendant was already in custody, obtaining a sample of his blood pursuant to a nontestimonial identification order under § 15A-271 et seq., absent his consent or a search warrant, violated his rights under N.C. Const., Art. I, § 20 to be free from unreasonable searches and seizures, and the evidence should have been suppressed. State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).

Failure to File Warrant with Clerk Did Not Require Suppression.— Although application and search warrant were not filed with clerk as required by statute, such violation did not require that the seized evidence be suppressed; the failure to timely file these documents with the clerk after the warrant was issued did not rise to the level of a constitutional violation that would require suppression under subdivision (1) of this section. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989).

III. SUBSTANTIAL VIOLATION OF CHAPTER.

Failure of affidavit to comply with § 15A-244(3) constituted a substantial violation requiring suppression of evidence seized in search, and where, additionally, there was evidence of willfulness on the part of the affiant, demonstrated by a statement in the affidavit that the suspects were under surveillance by officers from 7:15 p.m. to 10:50 p.m., where the evidence disclosed that the suspects disappeared from the view of the officers from 8:15 p.m. to 10:25 p.m. and that the affiant was aware of this break in the surveillance, the trial court erred in denying defendant's motion to suppress. State v. Hyleman, 324 N.C. 506, 379 S.E.2d 830 (1989).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

CASE NOTES

I. General Consideration.
II. Motions First Made at Trial.
III. Additional Pertinent Facts.

I. GENERAL CONSIDERATION.

When Failure to Hold Voir Dire Is Harmless. —

Trial court's failure to conduct a voir dire in order to determine the admissibility of in-court identification testimony allegedly tainted by a suggestive pretrial photographic line-up was error; however, assuming, arguendo, that the photographic line-up was impermissibly suggestive, the presence of clear and convincing evidence of the independent origin of the identification, rendered the trial court's failure to conduct a voir dire harmless. State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992).

Applied in State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Lynch, 94 N.C. App. 330, 380 S.E.2d 397 (1989); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Williams, 98 N.C. App. 405, 390 S.E.2d 729 (1990); State v. Schirmer, 104 N.C. App. 472, 409 S.E.2d 704 (1991); State v. Austin, 111 N.C. App. 590, 432 S.E.2d 881 (1993).

Quoted in State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (1994).

Cited in State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. Summers, 105 N.C. App. 420, 413 S.E.2d 299 (1992); State v. Byers, 105 N.C. App. 377, 413 S.E.2d 586 (1992).

II. MOTIONS FIRST MADE AT TRIAL.

Requirements for Motion Made at Trial. — Statement of the Court of Appeals in State v. Simmons, 59 N.C.App. 287, 290, 296 S.E.2d 805, 808 (1982), cert. denied, 307 N.C. 701, 301 S.E.2d 395 (1983) in interpreting State v. Satterfield, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980), that a motion without such a supporting affidavit may be summarily denied, is overruled. State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991).

To the extent that State v. Satterfield, 300 N.C. 621, 625, 268 S.E.2d 510, 514 (1980) suggests a requirement for an affidavit when the motion to suppress is made at trial, it is hereby disapproved. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

A motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made. While an affidavit is not required for a motion timely made at trial, the defendant must, however, specify that he is making a motion to suppress and request a voir dire. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

III. ADDITIONAL PERTINENT FACTS.

Subsection (c) of this section clearly requires a showing of previously undiscovered facts to renew a motion to suppress evidence. State v. Moose, 101 N.C. App. 59, 398 S.E.2d 898 (1990), discretionary review denied, 328 N.C. 575, 403 S.E.2d 519 (1991).

Corroborative Evidence Not Additional Pertinent Fact. — Where defendant testified at a hearing on a motion to suppress his confession that he was under the influence of drugs and was drowsy at the time he confessed, an officer testified defendant was alert when he confessed, and the trial judge found that defendant was not under the influence of drugs when he made his confession, the trial court did not err in refusing to conduct a new suppression hearing because of newly discovered evidence when one of the robbery victims testified at trial that he saw defendant at the police station and he appeared sleepy, since such testimony only corroborated evidence already before the court and was not an "additional pertinent fact" within the meaning of subsection (c) of this section. State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

Two Paragraphs from Supplemental Report Not Additional Pertinent Facts. — Trial court did not err in refusing to hear a renewed motion to suppress evidence found in search, where defendant asserted that he was entitled to another hearing because of newly discovered evidence and where the "new evidence" was a two paragraph excerpt from the arresting officer's "Supplemental Report" that had been withheld from defendant; the two paragraphs were not "additional pertinent facts" that had any bearing on defendant's motion to suppress, since all of the information in these paragraphs was brought out through testimony of the officers at the pre-trial suppression hearing. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Fabricated "Anonymous Tip." — Where the original determination and denial of defendant's motion to suppress in the North Carolina Supreme Court relied upon the assumption that tip to police was anonymous, but in his supplemental motion, defendant presented evidence that the "anonymous tip" was fabricated by police, defendant's new evidence was pertinent; thus, denial of his motion to suppress was overruled. State v. Watkins, 120 N.C. App. 804, 463 S.E.2d 802 (1995).

§ 15A-976. Timing of pretrial suppression motion and hearing.

CASE NOTES

Motion to Suppress Held Timely. — Defendant's second motion to suppress, filed on the day defendant's case was calendared for trial, but prior to jury selection, was timely. State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

Applied in State v. Davis, 97 N.C. App. 259, 388 S.E.2d 201 (1990).

Cited in State v. Seagle, 96 N.C. App. 318, 385 S.E.2d 532 (1989).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

I. General Consideration.
II. Findings of Fact.

I. GENERAL CONSIDERATION.

Where pretrial motion to suppress meets the procedural requirements of this Article, etc. —

A motion to suppress is not subject to a summary denial where the defendant has alleged a legal basis for the motion and has provided a supporting affidavit; if the motion is not determined summarily the judge must make the determination after a hearing and finding of facts. State v. Kirkland, 119 N.C. App. 185, 457 S.E.2d 766 (1995), aff'd, 342 N.C. 891, 467 S.E.2d 242 (1996).

Defendant did not waive his right to contest admissibility of statements by him by failing to comply with procedural requirements of this section that motion to suppress evidence must contain legal basis where trial judge exercised his discretion not to summarily deny motion and immediately proceeded to conduct voir dire relating to the admissibility of the defendant's statements. State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988), cert. denied, 328 N.C. 273, 400 S.E.2d 459 (1991).

Where defendant's initial motion to suppress was unverified and not accompanied by an affidavit as required by statute, the motion was subject to being summarily denied, and the trial court did not abuse its discretion in denying such motion. State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

Unsupported Allegation of Bad Faith. — Where defendant's second motion to suppress questioned affiant's good faith but her affidavit in support of the motion merely attempted to point out factual inaccuracies in officers' application for search warrant, defendant's affidavit failed to support the additional allegation contained in her motion, and the motion was subject to being denied under subsection (c) of this section. State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

Unsupported Allegation of Reasonable Expectation of Privacy. — Where defendant's motion alleged, as a basis for suppressing matchbox and its contents, that law enforcement officers had, without his consent, made a warrantless search of an area outside his house, but in his affidavit, defendant stated that he did not exercise dominion over the area in which the matchbox was found, defendant's affidavit did not support the alleged ground for suppression, as defendant did not have a reasonable expectation of privacy in the area searched. State v. Williams, 98 N.C. App. 405, 390 S.E.2d 729 (1990), overruled on other grounds, State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (1994).

Applied in State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); State v. Talley, 110 N.C. App. 180, 429 S.E.2d 604 (1993); State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994); State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995).

Stated in State v. McQueen, 324 N.C. 18, 377 S.E.2d 38 (1989); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995).

Cited in State v. Narcisse, 90 N.C. App. 414, 368 S.E.2d 654 (1988); State v.

Jones, 197 N.C. App. 189, 388 S.E.2d 213 (1990); State v. Coffey, 326 N.C. 268, 389 S.E.2d 48 (1990); State v. Green, 103 N.C. App. 38, 404 S.E.2d 363 (1991).

II. FINDINGS OF FACT.

When Findings of Fact Not Required. — When there is no material conflict in the evidence presented on a motion to suppress evidence, the trial judge may admit the challenged evidence without specific findings of fact, although findings of fact are preferred. In that event, the necessary findings are implied from the admission of the challenged evidence. State v. Norman, 100 N.C. App. 660, 397 S.E.2d 647 (1990).

Findings of fact by the trial court judge are conclusive, etc. — Where the waiver of rights form was read to defendant both in English and in Vietnamese, defendant was asked if he understood his rights and answered "yes" in English and at no time did defendant indicate that he did not understand the questions, was the findings of fact that defendant's statement was voluntary were supported by competent evidence and were conclusive. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

Findings of fact made by the trial court are conclusive and binding upon appellate courts if supported by competent evidence. State v. Jordan, 120 N.C. App. 364, 462 S.E.2d 234, appeal dismissed and cert. denied, 342 N.C. 416, 465 S.E.2d 546 (1995).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Challenge to Good Faith of Affiant. — Subsection (a) of this section permits a defendant to challenge the validity of a search warrant by attacking the good faith of the affiant in providing information relied upon to establish probable cause. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Hearing Required. — When a defendant makes allegations that an affidavit to support the issuance of a search warrant contains deliberate falsehood or reckless disregard for the truth and the affidavit would not be sufficient to support the issuance of a search warrant without the false or reckless statements, the defendant is entitled to a hearing on his allegations. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223, cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

Unsupported Allegation of Bad Faith. — Where defendant's second motion to suppress questioned affiant's good faith but her affidavit in support of the motion merely attempted to point out factual inaccuracies in officers' application for search warrant, defendant's affidavit failed to support the additional allegation contained in her motion, and the motion was subject to being denied under § 15A-977(c). State v. Langdon, 94 N.C. App. 354, 380 S.E.2d 388 (1989).

Variance Between Affidavit and Report. — Variance between affidavit, which stated that informant had been inside house, and officers' supplemental report, did not show that the officers were acting in bad faith when they provided sworn information to the magistrate. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Denial of Motion Where Information Sufficient to Establish Probable Cause. — Where there was sufficient information in the affidavit, upon which search warrant issued, to establish probable cause that illegal drug activity and drug paraphernalia would be found on the premises to be searched, the trial court properly denied defendant's motion to suppress the evidence. State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (1994), cert. denied and appeal dismissed, 336 N.C. 75, 445 S.E.2d 39 (1994).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

CASE NOTES

I. General Consideration.
II. Appeal From Denial of Motion.

I. GENERAL CONSIDERATION.

Applied in State v. Furner, 94 N.C. App. 584, 380 S.E.2d 619 (1989); State v. Christie, 96 N.C. App. 178, 385 S.E.2d 181 (1989); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Tew, 326 N.C. 732, 392 S.E.2d 603 (1990); State v. Beveridge, 112 N.C. App. 688, 436 S.E.2d 912 (1993); State v. Wooding, 117 N.C. App. 109, 449 S.E.2d 760 (1994).

Quoted in State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437, cert. denied, 338 N.C. 523, 452 S.E.2d 823 (1994).

Stated in State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995).

Cited in State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988); State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989); Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990); State v. Green, 103 N.C. App. 38, 404 S.E.2d 363 (1991); State v. McDaniels, 103 N.C. App. 175, 405 S.E.2d 358 (1991); State v. Hudson, 103 N.C. App. 708, 407 S.E.2d 583 (1991); State v. Battle, 109 N.C. App. 367, 427 S.E.2d 156 (1993); State v. Barber, 335 N.C. 120, 436 S.E.2d 106 (1993); State v. Shannon, 117 N.C. App. 718, 452 S.E.2d 825 (1995); State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995); State v. Munsey, 342 N.C. 882, 467 S.E.2d 425 (1996).

II. APPEAL FROM DENIAL OF MOTION.

Right to Appeal Conditional. — Subsection (b) allows review of an order finally denying a motion to suppress evidence on appeal from a judgment of conviction, including a judgment entered on a guilty plea; however, this right to appeal is conditional, not absolute. State v. McBride, 120 N.C. App. 623, 463 S.E.2d 403 (1995).

Burden on Defendant. — Pursuant to the statute, a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty. State v. McBride, 120 N.C. App. 623, 463 S.E.2d 403 (1995).

§ 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

CASE NOTES

Prior Convictions Obtained in Violation of Right to Counsel. — Admission of prior convictions obtained in violation of the right to counsel for purposes of impeachment or to affect the length of sentence violates this section. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

Silence at Trial Precludes Raising Issue on Appeal. —

Where defendant neither objected nor moved to suppress evidence of prior conviction, he was precluded from raising the issue of his indigency and lack of counsel on appeal. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

Denial of Motion Upheld. — The trial court did not err in denying second-degree murder defendant's motion to suppress evidence of three prior convictions, later relied upon by the court as aggravating factors to support sentencing defendant to a term greater than the presumptive. State v. Hester, 111 N.C. App. 110, 432 S.E.2d 171 (1993).

Applied in State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757 (1991).

Stated in State v. Smith, 96 N.C. App. 235, 385 S.E.2d 349 (1989).

Cited in State v. Turner, 330 N.C. 249, 410 S.E.2d 847 (1991); State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

Legal Periodicals. —

For note, "State v. Gravette: Is There Justice for Incompetent Defendants in North Carolina?," see 69 N.C.L. Rev. 1484 (1991).

CASE NOTES

This section is only concerned with defendant's mental capacity to proceed, rather than physical illness. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

The objective of this section and § 15A-1002 is to ensure that a defendant will not be tried or punished while mentally incapacitated. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

Test for capacity, etc. —

State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985) and State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975), establish the proposition that a defendant does not have to be at the highest stage of mental alertness to be competent to be tried; so long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

Lay Witness May Testify on Capacity to Proceed. — Where, in support of her motion before arraignment to determine her capacity to proceed to trial, defendant called two witnesses who had opportunity to observe defendant during her incarceration, one witness would have testified that after close and repeated observations of defendant she held opinion that defendant was unable to comprehend what was "going on" and could not assist in her own defense, and another witness testified for record that after observing defendant "most every day" after her incarceration his opinion was that defendant was "not capable" of assisting in her defense, testimony should have been admitted and considered by trial judge on the issue of defendant's capacity to proceed to trial and his failure to consider it constituted error. State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989).

Defendant, who had undergone brain surgery, etc. —

Defendant, who as a result of a self-inflicted gunshot wound to the head and resulting surgery, had suffered damage to her brain which impaired her emotional response to situations in which she found herself, was competent to make a valid confession and stand trial where there was evidence that defendant had an I.Q. within the normal range and that she knew what the charges were and what could happen to her if she was convicted; if this did not worry or upset her because of her altered mental condition, it did not mean she did not understand these facts, and the court could find from this and other evidence that the defendant understood the nature and object of the proceedings against her and could comprehend her own situation in reference to the proceedings. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

Defendant's voluntary use of drugs during her trial did not warrant the order of a new trial where the record otherwise showed her to have been competent. State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993).

Defendant's Attitude. — The trial court could properly find that defendant did not suffer from a mental incapacity where his attitude, rather than a mental illness or defect, prevented him from assisting in his own defense. State v. Brown, 339 N.C. 426, 451 S.E.2d 181 (1994), cert. denied, — U.S. —, 116 S. Ct. 90, 133 L. Ed. 2d 46 (1995).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

(b) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered pursuant to subdivision (1) or (2) of this subsection, the hearing shall be held after the examination. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence. The court:

(1) May appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, to examine the defendant and return a written report describing the present state of the defendant's mental health; reports so prepared are admissible at the hearing and the court may call any expert so appointed to testify at the hearing; any expert so appointed may be called to testify at the hearing by the court at the request of either party; or

(2) In the case of a defendant charged with a misdemeanor only after the examination pursuant to subsection (b)(1) of this section or at any time in the case of a defendant charged with a felony, may order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed; in the case of a defendant charged with a felony, if a defendant is ordered to a State facility without first having an examination pursuant to subsection (b)(1) of this section, the judge shall make a finding that an examination pursuant to this subsection would be more appropriate to determine the defendant's capacity; the sheriff shall return the defendant to the county when notified that the evaluation has been completed; the director of the facility shall direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who shall bring it to the attention of the court; the report is admissible at the hearing.

(3) Repealed by Session Laws 1989, c. 486, s. 1, effective October 1, 1989.

(b1) If the report pursuant to subdivision (1) or (2) of subsection (b) of this section indicates that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or, if the defendant is hospitalized, in the county in which the defendant is hospitalized.

(c) The court may make appropriate temporary orders for the confinement or security of the defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. A copy of the full report shall be forwarded to defense counsel, or to the defendant if he is not represented by counsel provided, if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney. Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9; 1989, c. 486, s. 1; 1991, c. 636, s. 19(b); 1995, c. 299, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 13, 14.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to cases pending on or after that date, in subdivision (b)(2) added the language beginning "in the case of a defendant charged with a felony" and ending "when notified that the evaluation has been completed", and deleted "if the report indicates that the defendant has capacity to proceed, the clerk shall direct the sheriff to return him to the county" from the end of that subdivision.

Session Laws 1995 (Reg. Sess., 1996), c. 742, ss. 13 and 14, effective June 21, 1996, substituted "subdivision (1) or (2) of this subsection" for "subdivisions (1) or (2) below" in the second sentence of subsection (b); and substituted "subdivision" for "subdivisions" in subsection (b1).

CASE NOTES

I. General Consideration.
II. Hearing.

I. GENERAL CONSIDERATION.

Purpose. — The objective of § 15A-1001 and this section is to ensure that a defendant will not be tried or punished while mentally incapacitated. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

It was not error for the judge to deny a motion asking that the defendant be examined to determine whether he was competent to stand trial when nothing was shown to the court as to why the motion should have been granted. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

Section Does Not Authorize Physical Exam. — Subdivision (b)(1) authorizes a court to appoint medical experts to examine the state of defendant's mental health; however, it does not authorize the court to appoint a medical examiner for a general physical exam or to see if certain physical problems exist. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

Psychiatric Examination Is in Court's Discretion. —

The question of whether the defendant is to be examined by a psychiatric expert is within the sole discretion of the trial court. State v. O'Neal, 116 N.C. App. 390, 448 S.E.2d 306, cert. denied, 338 N.C. 522, 452 S.E.2d 821 (1994).

Suicide Attempt by Defendant. — Where defendant's own expert witness had previously testified that he was competent to stand trial and the only additional evidence before the court at the time it denied the request for a psychological examination was a suicide attempt, or suicide gesture, that one incident did not require as a matter of law that the trial court appoint an expert to evaluate defendant's mental health. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, — U.S. —, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995).

Applied in State v. Nobles, 99 N.C. App. 473, 393 S.E.2d 328 (1990).

Cited in State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989); State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989); State v. Hope, 96 N.C. App. 498, 386 S.E.2d 224 (1989); State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990); State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993).

II. HEARING.

While the better practice is for the trial court to make specific findings and conclusions when ruling on a motion under subsection (b), failure to do so is not error where the evidence compels the ruling made. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

CASE NOTES

Cited in Davis v. North Carolina Dep't of Human Resources, 121 N.C. App. 105, 465 S.E.2d 2 (1995).

§ 15A-1004. Orders for safeguarding of defendant and return for trial.

CASE NOTES

Court Had No Authority to Order Supervision of Defendant. — Superior court had no authority to enter order requiring Division of Adult Probation and Parole, without its consent, to provide supervision of defendant, who had been determined incompetent to stand trial but not subject to involuntary commitment, while in custody of his former wife. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

§ 15A-1008. Dismissal of charges.

CASE NOTES

Cited in State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Article 57.

Pleas.

§ 15A-1011. Pleas in district and superior courts; waiver of appearance.

(a) A defendant may plead not guilty, guilty, or no contest "(nolo contendere)." A plea may be received only from the defendant himself in open court except when:

(1) The defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer; or
(2) There is a waiver of arraignment and a filing of a written plea of not guilty under G.S. 15A-945; or
(3) In misdemeanor cases there is a written waiver of appearance submitted with the approval of the presiding judge; or
(4) Written pleas in traffic cases, hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A are authorized under G.S. 7A-146(8); or
(5) The defendant executes a waiver and plea of not guilty as provided in G.S. 15A-1011(d).
(6) The defendant, before a magistrate or clerk of court, enters a written appearance, waiver of trial and plea of guilty and at the same time makes restitution in a case wherein the sole allegation is a violation of G.S. 14-107, the check is in an amount provided in G.S. 7A-273(8), and the warrant does not charge a fourth or subsequent violation of this statute.

(b) A defendant may plead no contest only with the consent of the prosecutor and the presiding judge.

(c) Upon entry of a plea of guilty or no contest or after conviction on a plea of not guilty, the defendant may request permission to enter a plea of guilty or no contest as to other crimes with which he is charged in the same or another prosecutorial district as defined in G.S. 7A-60. A defendant may not enter any plea to crimes charged in another prosecutorial district as defined in G.S. 7A-60 unless the district attorney of that district consents in writing to the entry of such plea. The prosecutor or his representative may appear in person or by filing an affidavit as to the nature of the evidence gathered as to these other crimes. Entry of a plea under this subsection constitutes a waiver of venue. A superior court is granted jurisdiction to accept the plea, upon an appropriate indictment or information, even though the case may otherwise be within the exclusive original jurisdiction of the district court. A district court may accept pleas under this section only in cases within the original jurisdiction of the district court and in cases within the concurrent jurisdiction of the district and superior courts pursuant to G.S. 7A-272(c).

(d) A defendant may execute a written waiver of appearance and plead not guilty and designate legal counsel to appear in his behalf in the following circumstances:

(1) The defendant agrees in writing to waive the right to testify in person and waives the right to face his accusers in person and agrees to be bound by the decision of the court as in any other case of adjudication of guilty and entry of judgment, subject to the right of appeal as in any other case; and

(2) The defendant submits in writing circumstances to justify the request and submits in writing a request to proceed under this section; and

(3) The judge allows the absence of the defendant because of distance, infirmity or other good cause.

(e) In the event the judge shall permit the procedure set forth in the foregoing subsection (d), the State may offer evidence and the defendant may offer evidence, with right of cross-examination of witnesses, and the other procedures, including the right of the prosecutor to dismiss the charges, shall be the same as in any other criminal case, except for the absence of defendant. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; c. 626, s. 1; 1983, c. 586, s. 3; 1987, c. 355, s. 4; 1987 (Reg. Sess., 1988), c. 1037, s. 64; 1995 (Reg. Sess., 1996), c. 725, s. 5.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to offense committed on or after that date, added "and in cases within the concurrent jurisdiction of the district and superior courts pursuant to G.S. 7A-272(c)" to the end of subsection (c).

CASE NOTES

Plea of Not Guilty By Reason of Insanity. — Where the prosecuting attorney by his argument implied that the defendant could have pled not guilty by reason of insanity and the State would not have had to prove all the elements of the crime, this was an incorrect statement of the law. A criminal defendant may only plead not guilty, guilty or no contest; if a defendant pleads not guilty he may raise the defense of insanity by filing a pretrial motion that he intends to rely on that defense. State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993).

Cited in State v. Rodriquez, 111 N.C. App. 141, 431 S.E.2d 788 (1993).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;

(2) Determining that he understands the nature of the charge;

(3) Informing him that he has a right to plead not guilty;

(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;

(5) Determining that the defendant, if represented by counsel, is satisfied with his representation;

(6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive

sentences, and of the mandatory minimum sentence, if any, on the charge; and

(7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

(b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the prosecutor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1989, c. 280; 1993, c. 538, s. 10; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. — Session Laws 1993, c. 538, s. 10, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

CASE NOTES

Court Must Find Factual Basis for Plea. — When plea of no contest is now entered there must be a finding by the court that there is a factual basis for the plea. This finding and entry of judgment thereon constitute an adjudication of guilt. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

A judge may not accept a defendant's guilty plea without first determining that there is a factual basis for the plea; thus, where there was no factual basis for defendant's guilty plea to the charge of failure to appear for trial it was error for the trial court to accept defendant's plea. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

Subsection (c) of this section provides that before the court may accept a no contest plea it must determine that there is a factual basis for the plea. This changes the rule that the court must impose a sentence based on the no contest plea and may not adjudicate the guilt of defendant upon such a plea. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

A mandatory minimum sentence constitutes a "direct consequence" of a guilty plea, therefore, a court must apply the review required by § 15A-1443(b). State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994).

This statute does not contain a requirement that the trial court attempt to discuss or explain to defendant any aspect of law pertaining to parole; thus, the court was under no duty to do so. State v. Daniels, 114 N.C. App. 501, 442 S.E.2d 161 (1994).

In practice it is generally counsel for the state and the defendant who furnish the court sentencing information on transcript of plea forms. As officers of the court, these individuals also have a responsibility to ensure the forms are complete and accurate when submitted to the trial judge. State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994).

Potential Fines. — Subsection (a) contains no provision requiring a defendant to be informed of any potential fines prior to acceptance of a guilty plea. State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994).

A presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

A motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment or collateral attack on such a plea, which would be by a motion for appropriate relief. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

Basis for Presentence Motion Held Sufficient. — For case holding defendant proffered a fair and just reason for his presentence motion to withdraw his plea of guilty. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

A no contest plea may be used to aggravate a crime so as to sustain a death sentence under § 15A-2000(e). State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

No Contest Plea as Conviction for Evidentiary Purposes in Other Proceedings. — Under subsection (c) of this section, when a plea of no contest is now entered there must be a finding by the court that there is a factual basis for the plea. This finding and the entry of a judgment thereon constitute an adjudication of guilt. This adjudication would be a conviction within the meaning of § 8C-1, Rule 609(a), and as a conviction it may then be used in another case to attack the credibility of a witness. State v. Outlaw, 326 N.C. 647, 390 S.E.2d 336 (1990).

Subsection (c) of this section has changed the rule that a court may not adjudicate the defendant's guilt on a plea of no contest. Before a court may now accept a plea of no contest it must make a finding that there is a factual basis for the plea. This amounts to an adjudication of guilt, and the rationale of former cases that there is no adjudication on a no contest plea so that it may not be used in another case no longer applies. Davis v. Hiatt, 326 N.C. 462, 390 S.E.2d 338 (1990).

Use of No Contest Plea for Impeachment. — A no contest plea can properly be admitted under § 8C-1, Rule 609(a) for purposes of impeachment. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Use of No Contest Plea Entered Prior to July 1, 1975 to Support Habitual Felon Charge Not Proper. — Where defendant was convicted on a plea of no contest to a charge of felony escape, and judgment was entered on April 2, 1973, before the effective date of Chapter 15A (July 1, 1975), and where the rule at that time was that a conviction resulting from a nolo contendere plea could not be used against defendant in any case other than the one in which it was entered because it was neither an admission nor an adjudication of guilt, use of this conviction as one of three prior felony convictions required by § 14-7.1 to support a charge of being a habitual felon was improper. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Applied in State v. Deal, 99 N.C. App. 456, 393 S.E.2d 317 (1990); State v. Moore, 102 N.C. App. 434, 402 S.E.2d 435 (1991); State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Quoted in State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992); State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993).

Cited in State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Suites, 109 N.C. App. 373, 427 S.E.2d 318 (1993); State v. Stafford, 114 N.C. App. 101, 440 S.E.2d 846 (1994); State v. Washington, 116 N.C. App. 318, 447 S.E.2d 799 (1994).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

CASE NOTES

Plea Bargain Agreement Must Have Judicial Approval. — A plea bargain agreement involving a sentence recommendation by the State must first have judicial approval pursuant to subsection (b) of this section before it is enforceable; it is merely an executory agreement until approved by the court. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

It is of No Effect if it Does Not. — Alleged plea agreement involved a sentence recommendation that defendant enter pleas of guilty to the felonies of second-degree murder, first-degree burglary, robbery with a dangerous weapon, and conspiracy to commit second-degree burglary and that defendant receive two concurrent life sentences. However, the proposed agreement between the defendant and the State had no effect as a matter of law because it had not been approved by the trial judge. State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993).

Court's Refusal to Consider Held Prejudicial. — The trial court's refusal to consider plea bargain arrangement was prejudicial error entitling defendant to a new trial. State v. Lineberger, 342 N.C. 599, 467 S.E.2d 24 (1996).

Applied in State v. Deal, 99 N.C. App. 456, 393 S.E.2d 317 (1990).

§ 15A-1025. Plea discussion and arrangement inadmissible.

CASE NOTES

Statement Not Made During Actual Negotiations. — Trial court erred by not allowing witness to testify regarding statement allegedly made by defendant: "Yeah, I killed the bitch. I've done my time. I'll take a plea bargain and walk," as this section did not cover this statement because it was not made during actual plea bargain negotiations. State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995).

§ 15A-1027. Limitation on collateral attack on conviction.

Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired. (1973, c. 1286, s. 1; 1975, c. 166, s. 21; 1989, c. 290, s. 4.)

§§ 15A-1028, 15A-1029: Reserved for future codification purposes.

ARTICLE 58A.

Procedures Relating to Felony Guilty Pleas in District Court.

§ 15A-1029.1. Transfer of case from superior court to district court to accept guilty and no contest pleas for certain felony offenses.

(a) With the consent of both the prosecutor and the defendant, the presiding superior court judge may order a transfer of the defendant's case to the district court for the purpose of allowing the defendant to enter a plea of guilty or no contest to a Class H or I felony.

(b) The provisions of Article 58 of this Chapter apply to a case transferred under this section from superior court to district court in the same manner as if the plea were entered in superior court. Appeals that are authorized in these matters are to the appellate division. (1995 (Reg. Sess., 1996), c. 725, s. 6.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 725, s. 11, made this Article effective December 1, 1996, and applicable to offenses committed on or after that date.

§ 15A-1030: Reserved for future codification purposes.

ARTICLE 59.

Maintenance of Order in the Courtroom.

§ 15A-1031. Custody and restraint of defendant and witnesses.

CASE NOTES

Judge Did Not Err in Decision to Restrain or Remove Defendant. — Where the trial judge warned defendant out of the presence of the jury that he would be removed from the courtroom if his disruptive behavior continued and entered into the record his reasons for the removal, and where the court informed defendant that he could return to the courtroom upon his assurance of good behavior and that if he chose not to return he would be given an opportunity to confer with his attorney, there was no error in the trial court's decision to restrain defendant or to remove him from the courtroom. State v. Callahan, 93 N.C. App. 579, 378 S.E.2d 812, cert. denied, 325 N.C. 274, 384 S.E.2d 521 (1989).

There was no error where the defense witnesses were shackled while in the courtroom, because they were placed in, and removed from, the witness chair outside the presence of the jury. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

§ 15A-1032. Removal of disruptive defendant.

CASE NOTES

Judge Did Not Need to Use Word "Absence" in Place of "Removal". — Trial judge's instruction to jury on defendant's removal from the courtroom was proper and he need not use the word "absence" in place of "removal" to meet the requirements of subdivision (b)(2). State v. Callahan, 93 N.C. App. 579, 378 S.E.2d 812, cert. denied, 325 N.C. 274, 384 S.E.2d 521 (1989).

Cited in State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989).

§ 15A-1034. Controlling access to the courtroom.

CASE NOTES

Cited in State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1051. Immunity; general provisions.

Editor's Note. —

Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4 amends s. 6 of Chapter 843 of Session Laws 1985 (Reg. Sess., 1986), as amended by s. 1 of Chapter 1040 of Session Laws 1987 (Reg. Sess., 1988), noted in the main volume under this section, to extend its expiration date to October 1, 1993.

Session Laws 1991, c. 686, s. 3 amends Session Laws 1985, c. 843, s. 6, as amended by Session Laws 1987, c. 1040, so as to delete the October 1, 1991 expiration provision. The 1991 act, which is in the coded bill drafting format set out in § 120-20.1, does not mention Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, which amended the 1985 act, as amended, to change the expiration date to October 1, 1993.

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

CASE NOTES

Constitutional Right to Disclosure. — Subdivision (c) and the Fourteenth Amendment to the Constitution of the United States require that any plea bargain with a person who is to testify against a defendant be disclosed to the defendant. State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992).

Law Enforcement Agencies Not Covered. — Defendant's contentions that he was prejudiced by the trial court's failure to compel the State to disclose any agreements between the prosecutor or any law enforcement agency and any potential witness, was without merit since within subsection (c) there is no mention of law enforcement agencies. State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

Applied in State v. Gregory, 341 N.C. 365, 459 S.E.2d 638 (1995).

ARTICLE 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

CASE NOTES

Editor's Note. — *The citations for State v. Brown, which is annotated several times under this section in the main volume, are incorrect. The citations should read: State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).*

When Motion Granted. —

A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice defendant's case and make it impossible for defendant to receive a fair and impartial verdict. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

Mistrial Is Matter of Court's Discretion. —

A trial court's ruling on a motion for mistrial is not reviewable on appeal absent the appearance of a manifest abuse of discretion. State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990).

Whether a mistrial should be granted pursuant to this section is a matter which rests in the sound discretion of the trial judge. Because such a ruling is within the trial judge's discretion, a mistrial is only appropriate where such serious procedural or other improprieties would make it impossible for a fair and impartial verdict to be rendered under the law. State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991), cert. denied, 331 N.C. 120, 414 S.E.2d 764 (1992).

Remarks of Prosecutor. — Refusal of court to grant a mistrial based on prosecutor's remarks directed solely toward defendant's failure to offer evidence to rebut the State's case, made in response to defendant's jury argument, and based on comments in the State's closing argument, in which the prosecutor argued that certain evidence was uncontradicted, did not constitute error. State v. Taylor, 340 N.C. 52, 455 S.E.2d 859 (1995).

Prosecutor's Outburst. — Where prosecutor interjected that he did not want to make an objection but that another judge he named would have had the defense counsel "locked up," the prosecutor's outburst, while inappropriate, did not make it impossible for defendant to receive a fair and impartial trial and defendant failed to show that the trial court abused its discretion by denying a mistrial. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Where attorney became emotional and could not continue to question defendant the brief emotional display was not prejudicial to defendant as the attorney removed herself from the courtroom quickly and quietly and the jury was immediately removed from the courtroom. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Motion Based upon Defendant's Own Misconduct. — Judge properly denied defendant's motion for a mistrial based upon defendant's own misconduct; if defendant was prejudiced in the eyes of the jury due to his own actions in the courtroom, he could not be heard to complain. In addition, evidence of defendant's guilt was overwhelming and it was unlikely that the outburst prevented him from receiving a fair verdict. State v. Marino, 96 N.C. App. 506, 386 S.E.2d 72 (1989).

Defendant's absence during the final two hours of jury deliberations did not result in substantial and irreparable prejudice to her case and was harmless error with regard to denying her the constitutional right to be present at every stage of her trial. State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808 (1993), aff'd, 337 N.C. 674, 447 S.E.2d 349 (1994), cert. denied, 335 N.C. 180, 438 S.E.2d 206 (1993).

Same — Mistrial Not Required. — Where a juror inadvertently read a portion of a newspaper article which reported that the defendant had Acquired Immune Deficiency Syndrome (AIDS), it was reasonable to conclude that the juror did not read the entire article and had formed no opinion that would jeopardize the defendant's right to a fair trial; there was no abuse of discretion in the decision of the trial judge to deny the defendant's motion for a mistrial. State v. Degree, 114 N.C. App. 385, 442 S.E.2d 323 (1994).

Violation of Sequestration Order. — There was no abuse of discretion where inadvertent violation of the order for the sequestration of a witness did not prejudice defendant. State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (1996).

Withdrawal of Incompetent Evidence by Court Cured Prejudice. — The trial court did not err in failing to declare a mistrial when a detective read from a recorded statement of co-conspirator, part of which indicated that the defendant had been involved with drugs in the past. The trial court had granted the defendant's motion in limine and forbidden any evidence concerning the defendant's prior drug dealings. Even so, the co-conspirator's statement as read by the detective included the remark that, "I knew that he (the defendant) had, you know, drug involvement in the past." The trial court then instructed the jury to disregard the statement. When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Prejudice From Court's Question Cured by Instructions — Any possible prejudice to defendant from the trial court's question to expert witness, which might have invaded the province of the jury to determine the credibility of the witness, was cured by the court's later jury instructions, and the trial court did not abuse its discretion by denying defendant's motion for a mistrial on this basis. State v. Gregory, 341 N.C. 365, 459 S.E.2d 638 (1995).

Emotional Outburst by Prosecuting Witness. —

Trial court did not err by failing to instruct the jury to disregard an emotional display by a murder victim's widow, when the defendant did not request a curative instruction or move for a mistrial. State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Victim's husband's emotional outburst was not so prejudicial to defendant as to render the denial of the motion for mistrial a manifest abuse of discretion reversible on appeal where the incident was apparently over quickly and caused minimal interruption. State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), cert. denied, — U.S. —, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995).

Coercion Not Shown. — Trial judge's remarks to the jury concerning the time available for deliberations were made in open court and in the presence of defendant and his counsel, and the substance of those remarks appeared of record. Trial judge's unrecorded remarks did not amount to coercion of the jury. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Where trial judge cautioned both parties before trial to avoid references to polygraph tests, but State's witness testified that he had asked defendant to take a polygraph test, there was no abuse of discretion by judge in denying defendant's motion for mistrial after defendant had been allowed to cross-examine the witness on that point and trial judge gave a cautionary instruction to the jury. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Doctor's Testimony on Defendant's Mental State. — Despite doctor's testimony in response to the court's inquiry regarding defendant's agitated state on the morning of his trial that defendant would "probably not, in his state" be able to effectively testify, defendant failed to show that the court's refusal to grant a mistrial was error; defendant did testify at trial and nothing in his testimony supported the argument that his alleged impaired condition prevented him from effectively testifying in his own defense. State v. Kinney, 92 N.C. App. 671, 375 S.E.2d 692 (1989).

Applied in State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Holman, 94 N.C. App. 361, 380 S.E.2d 128 (1989); State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. Ward, 104 N.C. App. 550, 410 S.E.2d 210 (1991); State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993); State v. Williams, 333 N.C. 719, 430 S.E.2d 888 (1993); State v. Johnson, 341 N.C. 104, 459 S.E.2d 246 (1995).

Quoted in State v. Vines, 105 N.C. App. 147, 412 S.E.2d 156 (1992); State v. Williamson, 333 N.C. 128, 423 S.E.2d 766 (1992); State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

Cited in State v. Smith, 96 N.C. App. 352, 385 S.E.2d 808 (1989); State v. McDonald, 97 N.C. App. 322, 387 S.E.2d 666 (1990); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991); State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992); State v. Walker, 332 N.C. 520, 422 S.E.2d 716 (1992); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993).

§ 15A-1062. Mistrial for prejudice to the State.

CASE NOTES

Cited in State v. Smith, 96 N.C. App. 352, 385 S.E.2d 808 (1989).

§ 15A-1063. Mistrial for impossibility of proceeding.

CASE NOTES

Quoted in State v. Felton, 330 N.C. 619, 412 S.E.2d 344 (1992).

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

ARTICLE 66.

Procedure for Hearing and Disposition of Infractions.

§ 15A-1113. Prehearing procedure.

CASE NOTES

Motorist's rights were not violated by officer's performance of registration check or by use of handcuffs. Burton v. City of Durham, 118 N.C. App. 676, 457 S.E.2d 329 (1995).

Cited in State v. Ghaffar, 93 N.C. App. 281, 377 S.E.2d 818 (1989).

§ 15A-1115. Review of disposition by superior court.

CASE NOTES

No Right to Appeal from Admission of Responsibility. — Defendant who is charged with an infraction and admits responsibility in the district court has no right to appeal for a trial de novo in superior court. State v. Richardson, 96 N.C. App. 508, 386 S.E.2d 98 (1989).

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 71.

Right to Trial by Jury.

§ 15A-1201. Right to trial by jury.

CASE NOTES

When Double Jeopardy Attaches in Bench Trial. — In a bench trial, double jeopardy does not attach until the introduction of evidence. State v. Brunson, 96 N.C. App. 347, 385 S.E.2d 542 (1989), aff'd, 327 N.C. 244, 393 S.E.2d 860 (1990).

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1212. Grounds for challenge for cause.

CASE NOTES

I. General Consideration.
II. Mental or Physical Infirmity.
III. Opinion as to Guilt or Innocence.
IV. Inability to Render Verdict in Accordance with Law.

I. GENERAL CONSIDERATION.

Standard of Review. — Unless the trial court's ruling on a challenge for cause is required by law, the ruling is reviewable on an abuse of discretion standard, and this section permits a challenge for cause against any prospective juror who "is unable to render a fair and impartial verdict." State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, — U.S. —, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

Defendant's Right Is to Reject Jurors. — A defendant is not entitled to any particular juror; his right to challenge is not a right to select but to reject a juror. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Exclusion of Panelists from Jury Upheld. — Defendant's contention that the State's exclusion of six black panelists from the jury that tried his case was racially motivated and a violation of various constitutional provisions had no support in the record, where two of the panelists had had brothers who had been charged with cocaine offenses, one knew two of defendant's witnesses, two others knew defendant's parents and one of his attorneys, and the last one knew defendant's family and both of his attorneys. To prevail on such a contention it must be shown, among other things, that the circumstances of the exclusions raise an "inference of racist motivation". State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Applied in State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990); State v. Locklear, 331 N.C. 239, 415 S.E.2d 726 (1992); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, — U.S. —, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994); State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, — U.S. —, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995).

Quoted in State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

Stated in State v. Cunningham, 333 N.C. 744, 429 S.E.2d 718 (1993).

II. MENTAL OR PHYSICAL INFIRMITY.

Inability to Follow Instructions. — The granting of a challenge for cause of a juror is within the discretion of the judge; nevertheless where a juror's answers show that he could not follow the law as given to him by the judge in his instructions to the jury, it was error not to excuse the juror. State v. Scales, 114 N.C. App. 735, 443 S.E.2d 124, cert. denied, 337 N.C. 805, 449 S.E.2d 755 (1994).

III. OPINION AS TO GUILT OR INNOCENCE.

Juror's Reaction to Nontestifying Defendant. — Where the questioned juror said that he could follow the law as given to him by the court but he repeatedly said the defendant's failure to testify would "stick in the back of [his] mind" while he was deliberating, the court should have allowed defendant's challenge for cause. State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992).

Notwithstanding a juror's opinion as to how the case should be decided, the juror may still serve if the court determines that the juror could "lay aside his impression or opinion and render a verdict based on the evidence presented in court." State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

Ability to Set Aside Opinion. — Even assuming arguendo that prospective juror had formed an opinion as to defendant's culpability, because he stated clearly and unequivocally that he could set aside that opinion and reach a decision based solely on the evidence presented at trial the trial court did not err by denying the challenge for cause. State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995).

Juror May Serve If He Can Lay Aside Opinion. —
The trial court is not required to remove from the panel every potential juror who has any preconceived opinions as to the potential guilt or innocence of a defendant. If the prospective juror, in the trial court's opinion, credibly maintains that he will be able to lay aside his impression or opinion and render a verdict based on the evidence presented in court, then it is not error for the court to deny defendant's motion to remove said juror for cause. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Thorough Questioning of Jury. — Trial court did not err in denying defendant's motion to excuse jurors for cause where the record revealed that two potential jurors were thoroughly questioned with regard to whether their familiarity with the case might taint their ability to be fair and impartial in rendering a verdict; their testimony demonstrated a conscientious and deliberate resolve to put familiarity and possible prejudice aside and to abide by the law and the trial court's instructions. State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993).

Trial court erred in denying defendant's challenge for cause where juror clearly stated that she believed defendant was guilty, and that he would have to be proven innocent, and this error was prejudicial where it stripped defendant of a peremptory challenge and prevented him from excusing another unacceptable juror who worked with the victim's brother and whom defendant believed would be sympathetic to the prosecution. State v. Shope, 118 N.C. App. 270, 454 S.E.2d 716 (1995).

IV. INABILITY TO RENDER VERDICT IN ACCORDANCE WITH LAW.

Inability to Impose Death Penalty. —

In defendant's trial for murder and robbery, trial court did not err in excusing two jurors for cause where neither could affirmatively agree to follow the law in carrying out his duties as a juror with respect to imposing the death penalty. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Trial court did not abuse its discretion in allowing district attorney to ask potential jurors whether they were "strong enough to recommend the death penalty," because this question was intended to elicit information that would indicate whether a challenge for cause was warranted. State v. Smith, 328 N.C. 99, 400 S.E.2d 712 (1991).

§ 15A-1213. Informing prospective jurors of case.

CASE NOTES

This section does not require the judge to inform the jury of the elements of each crime, but only requires the jury to be informed of the charges pending against defendant. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Nor does this section require a trial court to divulge a defendant's theory of the case to the venire. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Nothing in this section requires the court to instruct prospective jurors about sentences a defendant may have received for other offenses, either related or unrelated to the crime for which the jurors ultimately selected will recommend sentencing. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, — U.S. —, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

Summary of Indictment, etc. — Trial judge did not read from the indictments, but instead summarized the indictments in order to explain the charges to the jury. Such summarization is permissible and is in fact necessary to inform the jurors of the circumstances surrounding case against defendant, as required by this section. State v. Tilley, 100 N.C. App. 588, 397 S.E.2d 368 (1990).

Reading Indictment to Prospective Jurors. — Defendant was not entitled to a new trial because the trial court read the bill of indictment to all the prospective and eventual jurors during jury selection, where the trial court drew from the indictment the name of the defendant, the name of the victim, the date of the crime, and the elements of the charge for which defendant was being tried. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Evidence regarding defendant's mental state at the time of the crime is not an affirmative defense for which defendant bears the burden of proof; thus under this section the trial court has no statutory duty to inform the jury about such anticipated expert testimony. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Applied in State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990); State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Cited in State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990).

§ 15A-1214. Selection of jurors; procedure.

CASE NOTES

I. General Consideration.
II. Authority of Trial Judge.
III. Questioning of Prospective Jurors.

I. GENERAL CONSIDERATION.

Whether to grant individual voir dire is within the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), cert. denied, — U.S. —, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995).

Compliance with provisions for renewal of challenges for cause is a mandatory predicate to defendant's right to assert this argument on appeal. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Preserving Exception to Excusing of Prospective Juror. — By failing to comply with the procedure made mandatory by the statute, defendant in a prosecution for murder failed to preserve any purported error by the trial court in refusing to allow his challenge of prospective jurors for cause for appellate review. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, — U.S. —, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Acquaintance with Prospective Witnesses Insufficient to Require Challenge for Cause. — Defendant's contention that the trial judge erred in denying his challenge for cause to a juror was without merit where this juror knew four of the police officers who were prospective witnesses for the state, and although the defendant searched diligently during voir dire to discover some indication that the juror would be partial to these witnesses, the juror unequivocally stated repeatedly that his acquaintance with them would not affect his verdict in any way and there was no evidence to the contrary; there being no showing of prejudice on the part of the juror, his mere acquaintance with the officers was insufficient to find the trial judge's ruling erroneous. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Where the record was clear that potential juror ultimately felt she could put her feelings about her friend's murder aside and give the defendant a fair trial based solely on the evidence presented at trial, the trial court's denial of defendant's challenge for cause was not error. State v. House, 340 N.C. 187, 456 S.E.2d 292 (1995).

Necessity of Exhausting Peremptory Challenges, etc. —

Where defendant only used 13 of his 14 peremptory challenges during jury voir dire, leaving one remaining peremptory challenge which he could have used to strike juror defendant did not comply with statute; therefore, he did not preserve his right to appeal on that issue. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Defendant satisfied the mandates of subsection (h) of this section by (1) exhausting his peremptory challenges, (2) renewing his challenge for cause as to a juror who stated that she believed defendant would need to prove his innocence to avoid conviction on the charge of first-degree murder, and (3) having that renewed challenge denied by the trial court. State v. Cunningham, 333 N.C. 744, 429 S.E.2d 718 (1993).

Where defendants at no time sought to renew any of their previously denied challenges for cause, etc. —

Defendant exhausted his peremptories but did not renew his challenge for cause. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

The standard for determining whether a potential juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

Failure to Show Discrimination. — Where the record indicated that defendant failed to make a prima facie showing of discrimination and there were no suggestions of racial animus within the prosecutor's articulated motives for challenging the two veniremen, the assignment of error relating to selection of the petit jury was overruled on appeal. State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988), cert. denied, 324 N.C. 248, 377 S.E.2d 757 (1989).

Exclusion of Panelists from Jury Upheld. — Defendant's contention that the State's exclusion of six black panelists from the jury that tried the case was racially motivated and a violation of various constitutional provisions had no support in the record, where two had had brothers who had been charged with cocaine offenses, one knew two of defendant's witnesses, two others knew defendant's parents and one of his attorneys, and the last one knew defendant's family and both of his attorneys. To prevail on such a contention it must be shown, among other things, that the circumstances of the exclusions raise an "inference of racist motivation." State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Restriction in Error. — Restriction prohibiting defendant from asking questions previously asked by the court violated subsection (c) and was error. State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994).

Refusal to Excuse Juror Not Error. — Where prospective juror, after initially indicating he felt first-degree murderers should receive the death penalty, stated he could consider both possible sentences and would follow the law, trial court's refusal to excuse him for cause was not error. State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995).

Applied in State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988); State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988); State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996).

Quoted in State v. Powell, 340 N.C.

674, 459 S.E.2d 219 (1995).

Cited in State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988); State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); Smith v. Dixon, 766 F. Supp. 1370 (E.D.N.C. 1991), aff'd, 996 F.2d 667 (4th Cir. 1993).

II. AUTHORITY OF TRIAL JUDGE.

Supervisory Duties. — The trial court has the duty to supervise the examination of prospective jurors and to decide all questions relating to their competency. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Discretion of Trial Court. — The trial court has broad discretion to see that a competent, fair and impartial jury is impaneled and rulings in this regard will not be reversed absent a showing of abuse of discretion. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Subsection (c) does not preempt the exercise of the court's discretion during jury selection; it remains the court's prerogative to expedite jury selection by requiring general questions to be posed to the whole panel. State v. Campbell, 340 N.C. 612, 460 S.E.2d 144 (1995).

There was no error in the trial court's removal of juror for cause where she was visibly upset about her child's sickness, was in tears while explaining her situation to the trial judge and stated that she was distracted by her child's sickness and that she was sitting there thinking about it. State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994), cert. denied, — U.S. —, 115 S. Ct. 768, 130 L. Ed. 2d 665 (1995).

Duty of Judge When Jury Aware of Improper and Prejudicial Matters. — When there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

III. QUESTIONING OF PROSPECTIVE JURORS.

Whether to allow sequestration and individual voir dire is a matter for the trial court's discretion, etc. — In accord with first paragraph in the main volume. See State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992).

A trial court's ruling on whether to grant sequestration and individual voir dire of prospective jurors will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995).

Whether to grant individual voir dire is within the sound discretion of the trial court, whose ruling will not be disturbed on appeal absent a showing of abuse of discretion. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, — U.S. —, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), — N.C. —, 472 S.E.2d 23 (1996).

General Questions to Panel, etc. — In accord with first paragraph in the main volume. See State v. Gray, 322 N.C. 457, 368 S.E.2d 627 (1988).

Question as to Verdict, etc. — In accord with the main volume. See State v. Parks, 324 N.C. 420, 378 S.E.2d 785 (1989).

Question as to Whether Jurors Would Be Sympathetic to Defendant Who Was Intoxicated at Time of Offense. — Where the prosecutor in a murder case asked several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense, the questions were properly allowed as an inquiry into the jurors' sympathies toward an intoxicated person. The questions did not contain incorrect or inadequate statements of law, nor were they ambiguous or confusing; they did not tend to "stake out" the jurors as to their potential verdict or to ask how they would vote under a given state of facts, and the questions did not fish for answers to legal questions before the judge had instructed the jury. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Question as to Whether Victim's HIV-positive Status Would Prejudice Defendant. — Where the evidence of defendant's guilt was overwhelming, and his attorney conceded his guilt during closing arguments, the possibility of juror prejudice against defendant from the victim's HIV-positive status did not rise to the level of fundamental unfairness; the trial court's ruling that defendant could not directly pursue this line of questioning unless the victim's HIV-positive status was revealed in the answer of a prospective juror did not violate defendant's rights. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Courts must review entire record of jury voir dire when determining propriety of jury voir dire questions, rather than just isolated questions. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Racial Statement During Voir Dire. — Where a prospective juror, on voir dire, made racially biased statement in presence of other prospective jurors, defendant's motion to dismiss all prospective jurors who had heard the racial comment was properly denied where the statement did not give rise to a substantial fear that the jury had been prejudiced. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Statement By Prospective Juror Held Not To Prejudice Other Prospective Jurors. — The mere fact that the prospective juror referred to an assault committed by a black male, combined with the fact that the defendant was a black male, did not present the trial court with any substantial reason to fear that other prospective jurors who heard the statement would be prejudiced against the defendant. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Statement by a prospective juror that she could never vote to impose the death penalty regardless of the evidence is, in effect, a refusal to perform one's duties as a juror in accordance with the capital sentencing statute, and is therefore sufficient to support excusal for cause. State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

Juror's Training Affecting his Judgment as to Credibility. — The trial court did not abuse its discretion in refusing to excuse potential juror for cause where the juror's responses during voir dire indicated that he would not automatically give enhanced credence to testimony by any particular class of witness, but rather, certain factors in the witness's background, such as training or experience, would affect the credibility of that witness. State v. McKinnon, 328 N.C. 668, 403 S.E.2d 474 (1991).

Expression of Wish to Continue Questioning. — When a defendant peremptorily challenges some prospective jurors but wishes to continue asking questions of those remaining in the panel before passing them back to the prosecution, he must inform the trial court that he wishes to continue questioning the remaining prospective jurors. Hence, where defendant failed to object to trial court's statement that he must pass on remaining prospective jurors or to clarify that he was asking to continue questioning them rather than expressing uncertainty about the jury selection procedure, the court reasonably interpreted defendant's comment to be an expression of confusion about the jury selection procedure and the court's statement that defendant had to pass on the remaining jurors was not error. State v. Conaway, 339 N.C. 487, 453 S.E.2d 824, cert. denied, — U.S. —, 116 S. Ct. 223, 133 L. Ed. 2d 153 (1995).

Where the trial court ruled from the outset that no questions would be allowed if they had been previously asked of and answered by the juror in question, court erred since its ruling had the effect of preventing the defendant from asking questions solely because jurors had previously been asked the same questions. State v. Jones, 336 N.C. 490, 445 S.E.2d 23 (1994).

Trial court erred in preventing defendant's counsel from asking jurors questions, solely because the trial court had previously asked the same or similar questions; however, the defendant did not suffer any resulting prejudice. State v. Jones, 336 N.C. 490, 445 S.E.2d 23 (1994).

Refusal to Allow Questioning. — Where, after the jury was impanelled, defense counsel asked that a question he had asked a prospective juror during voir dire and the court's ruling sustaining the state's objection to the question be noted on the record, but the entire jury voir dire was not transcribed or made a part of the record, it was impossible for the court to tell on appeal whether the trial court erred in sustaining this objection. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990), finding neither abuse nor prejudice in the courts' ruling.

Questions posed did not amount to a proper inquiry as to whether the jurors could base their decision solely on the evidence presented at trial, but were an attempt by the defense counsel to "stake out" the prospective jurors on how they would react to potential publicity during the trial and the possibility of facing critical public opinion if the verdict, either guilty or not guilty, was not popular, the questions were not likely to result in answers relevant to a juror's qualification to serve; the trial court did not abuse its discretion by sustaining the prosecutor's objections to defendant's questions. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Decision whether to grant sequestration and individual voir dire of prospective jurors rests in the sound discretion of the trial court, and its ruling will not be disturbed absent a showing of an abuse of discretion. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Jury Voir Dire Need Not Be Conducted Individually in All Capital Cases. — Where, in a prosecution for conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder, the defendant failed to identify any reasonable grounds upon which the trial court could have determined that there was good cause for granting his motion for sequestration and individual voir dire of prospective jurors and the trial court did not abuse its discretion in denying the defendant's motion since there was no precedent for the defendant's suggestion that the jury voir dire must be conducted individually in all capital cases. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Abuse of Discretion Not Shown. — Defendant failed to show that the trial court abused its discretion in denying a request for individual voir dire and sequestration of prospective jurors where 146 potential jurors had to be examined, the trial judge allowed selective individual voir dire whenever defendant requested it, and each juror who decided the case stated they had no preconceived opinions and could give the defendant a fair trial based on the evidence. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where both the court and the defense attorney questioned juror about his relationship with the State's witness, and juror stated unequivocally that the acquaintance would not affect his ability to remain fair and impartial, there was no abuse of discretion in the trial judge's denial of defendant's motion to withdraw juror. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Trial court did not abuse its discretion in restricting individual voir dire of jurors, allowing defense counsel to question in detail only those individual jurors who responded to questions of the whole panel and seemed to favor the death penalty. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

In capital murder case that received substantial publicity, the trial court did not abuse its discretion in denying defendant's request for individual voir dire of potential jurors. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, — U.S. —, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

§ 15A-1215. Alternate jurors.

CASE NOTES

Replacing Juror After Excluding Defendant from In Camera Hearing. — While it is clearly error for the trial court to communicate with a juror in chambers and in the absence of defendant, counsel, or a court reporter, not every violation of a constitutional right is prejudicial. Where the record of an in camera hearing attended only by a juror, the trial judge, counsel, and a court reporter reflected the benign substance of the conversation — the juror's growing unease with her ability to impose the death penalty — and where after the hearing the juror was promptly and properly removed for cause, obviating the possibility that anything said to her privately by the trial court might infect the jury as a whole, the court's action was harmless beyond a reasonable doubt. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Replacing Juror Who Overheard Something About Case. — Conversation between a juror and the court which related to the juror's having "overheard something about the case," could not have influenced the verdict, because this juror was removed from the case prior to deliberations, and no remaining juror indicated that he or she had overheard anything about the case. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

Replacing Juror Who Had Child Care Problems. — Where judge contacted juror by phone, in the presence of counsel but outside the presence of defendant, to inquire about juror's inability to attend court, any error was harmless, and there was no abuse of discretion in the judge's decision to replace that juror, who had child care problems. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Challenging a Juror after Impanelment. — While there is no statutory provision covering the situation when a party seeks to challenge a juror after impanelment, subsection (a) allows the trial court to replace a juror with an alternate juror should the original one become disqualified or be discharged for some reason. State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995).

Trial judge has broad discretion in supervising the selection of the jury, to the end that both the State and the defendant may receive a fair trial. This discretionary power to regulate the composition of the jury continues beyond empanelment. It is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Presence of Alternate Held Not Prejudicial. — Although the presence of an alternate juror in the jury room during deliberations constitutes reversible error per se, presence of alternate when jury was sent out so that counsel could argue for corrections to the charge and when jurors selected a foreman was not prejudicial error. State v. Jernigan, 118 N.C. App. 240, 455 S.E.2d 163 (1995).

§ 15A-1216. Impaneling jury.

CASE NOTES

Cited in State v. Brunson, 120 N.C. App. 571, 463 S.E.2d 417 (1995).

§ 15A-1217. Number of peremptory challenges.

Legal Periodicals. —

For comment, "Equal Protection in Jury Selection? The Implementation of Batson v. Kentucky in North Carolina," see 69 N.C.L. Rev. 1533 (1991).

CASE NOTES

I. General Consideration.
II. Number of Challenges.
III. Capital Cases.

I. GENERAL CONSIDERATION.

Cited in State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991); State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (1994).

II. NUMBER OF CHALLENGES.

No Authority to Allow More, etc. — Trial court has no authority to increase the number of peremptory challenges provided by this section. State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989).

Exercise of Peremptory Challenges Held Not Prejudicial. — The State's exercise of peremptory challenges to exclude three potential black jurors did not violate defendant's constitutional rights, where the first was excused because that venire member had held three jobs in the preceding ten months, the next was peremptorily challenged because she claimed to have never participated in court proceedings while in fact she had an extensive criminal record, and where the State deemed the last member undesirable as a juror because of her headstrong and overbearing personality; these reasons rebutted the prima facie case of discrimination. State v. Sanders, 95 N.C. App. 494, 383 S.E.2d 409 (1989).

III. CAPITAL CASES.

A state may use its peremptory challenges to purge a jury of veniremen not excludable for cause under Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1967), for scruples about the death penalty. Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

Peremptory Challenges to Exclude Jurors Based on Voir Dire Testimony. — Both the prosecutor and defense counsel may exercise peremptory challenges to exclude jurors based upon their voir dire testimony regarding their attitude toward capital punishment. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1221. Order of proceedings in jury trial; reading of indictment prohibited.

(a) The order of a jury trial, in general, is as follows:

(1) Repealed by Session Laws 1995 (Regular Session 1996), c. 725, s. 10, effective December 1, 1996.

(1a) Unless the defendant has filed a written request for an arraignment, the court must enter a not guilty plea on behalf of the defendant in accordance with G.S. 15A-941. If a defendant does file a written request for an arraignment, then the defendant must be arraigned and must have his or her plea recorded out of the presence of the prospective jurors in accordance with G.S. 15A-941.

(2) The judge must inform the prospective jurors of the case in accordance with G.S. 15A-1213.

(3) The jury must be sworn, selected and impaneled in accordance with Article 72, Selecting and Impaneling the Jury.

(4) Each party must be given the opportunity to make a brief opening statement, but the defendant may reserve his opening statement.

(5) The State must offer evidence.

(6) The defendant may offer evidence and, if he has reserved his opening statement, may precede his evidence with that statement.

(7) The State and the defendant may then offer successive rebuttals as provided in G.S. 15A-1226.

(8) At the conclusion of the evidence, the parties may make arguments to the jury in accordance with the provisions of G.S. 15A-1230.

(9) The judge must deliver a charge to the jury in accordance with the provisions of G.S. 15A-1231 and 15A-1232.

(10) The jury must retire to deliberate, and alternate jurors who have not been seated must be excused as provided in G.S. 15A-1215.

(b) At no time during the selection of the jury or during trial may any person read the indictment to the prospective jurors or to the jury. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 2; 1995 (Reg. Sess., 1996), c. 725, s. 10.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective December 1, 1996, and applicable to offense committed on or after that date, deleted subdivision (a)(1), which read "The defendant must be arraigned and must have his plea recorded, out of the presence of the prospective jurors, unless he has waived arraignment under G.S. 15A-945"; and inserted subdivision (a)(1a).

CASE NOTES

- I. General Consideration.
- II. Informing Jurors of Case.
- IV. Opening Statement.

I. GENERAL CONSIDERATION.

Applied in State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994).

Cited in State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Quick, 323 N.C. 675, 375 S.E.2d 156 (1989); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989); State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

II. INFORMING JURORS OF CASE.

Defendant was not entitled to a new trial because the trial court read the bill of indictment to all the prospective and eventual jurors during jury selection, where the trial court drew from the indictment the name of the defendant, the name of the victim, the date of the crime, and the elements of the charge for which defendant was being tried. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Admonishing Jurors to Maintain Open Mind. — Where the court was simply admonishing the jurors, pursuant to § 15A-1236(a)(3), to maintain an open mind until they conducted their deliberations, the court was instructed them to resist their natural impulses to reach preliminary conclusions based on the quantity of evidence presented by the opening side. The court further informed the jurors that it was their duty to hear evidence from both sides and to discuss the case among themselves before reaching a conclusion. The instruction, in context, contained no expression of opinion about any question to be decided by the jury or about the weight of the evidence. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

IV. OPENING STATEMENT.

Purpose of Opening Statement. — An opening statement is for the purpose of making a general forecast of the evidence, not for arguing the case, instructing on the law, or contradicting the other party's witnesses. State v. Mash, 328 N.C. 61, 399 S.E.2d 307 (1991).

Determination of whether opening statement is proper must be made in light of the purpose thereof. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Scope of Opening Statement. — Subdivision (a)(4) permits each party in a criminal jury trial to make an opening statement but does not define the scope of that statement; however, wide latitude is generally allowed with respect to its scope. State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995).

Strict Supervision of Defendant's Opening Statement. — While the trial judge might have more strictly supervised defendant's opening statement than is done in most trials, the limitations he imposed did not sufficiently prejudice defendant's case to require reversal of his conviction. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

Mention of Victim's School Honors. — In trial for robbery with a dangerous weapon, trial court did not commit reversible error in allowing assistant district attorney to mention in his opening statement that the victim had graduated second in his high school class and obtained a college scholarship. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Trial judge's error in preventing defense counsel from telling the jury to give attention to all of the witnesses was harmless, where defendant failed to demonstrate prejudice requiring a reversal of his conviction. State v. Mash, 328 N.C. 61, 399 S.E.2d 307 (1991).

§ 15A-1222. Expression of opinion prohibited.

CASE NOTES

I. General Consideration.
II. Questions by Trial Judge.

I. GENERAL CONSIDERATION.

Section Not Applicable in Absence of Jury. —

This section is not applicable to statements made out of the jury's presence. State v. Joyce, 97 N.C. App. 464, 389 S.E.2d 136, cert. denied, 326 N.C. 803, 393 S.E.2d 902 (1990).

Prohibitions Against Expressions of Opinion Mandatory. — The statutory prohibitions against expressions of opinion by the trial court contained in this section and § 15A-1232 are mandatory. State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

As the standard-bearer of impartiality, the trial judge must not express any opinion, etc.

The judge may not express, during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury. State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991).

Comment Not Expression of Opinion. — The court's comment "you have now convicted this defendant on these three cases," did not amount to an expression of opinion as the jury had in fact just convicted the defendant of three offenses. State v. Brunson, 120 N.C. App. 571, 463 S.E.2d 417 (1995).

And it is immaterial how an opinion is expressed or implied, etc. —

It is impermissible for a judge to express an opinion, either explicitly or implicitly, at any time during the course of the trial. State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

But Not Every Improper Remark, etc. —

Not every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Burden of showing prejudice, etc. —

Defendant bears the burden of establishing that the trial judge's remarks were prejudicial. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Rulings on Repetitive Questions. —

The trial court did not express its opinion on questions of fact in the jury's presence and did not abuse its discretion in limiting repetitive questioning. State v. Hester, 343 N.C. 266, 470 S.E.2d 25 (1996).

Words whereby the trial court sustained objections by the defendant to questions asked by the prosecutor in the presence of the jury, namely, "[w]ell, as phrased, sustained," and "[w]ell, sustained for the moment," did not constitute an improper expression of opinion. State v. Shaw, 322 N.C. 797, 370 S.E.2d 546 (1988).

Trial judge's comments, admonishing defense counsel for leading witnesses on direct examination and arguing and badgering witness on cross-examination, did not express an opinion as to defendant's guilt, since all of the comments were routinely made in the course of the right and duty the trial judge had to control examination and cross-examination of witnesses, and the questions asked were for clarification purposes. State v. Alverson, 91 N.C. App. 577, 372 S.E.2d 729 (1988).

Statement That Defendant Had "Confessed". — Trial court's statement that the evidence tended to show that defendant had "confessed" that he "committed the crime charged" did not amount to an expression of opinion by the trial court, where evidence had been introduced which in fact tended to show that defendant had confessed to the crime charged, namely, first degree murder, and where the trial court's statement was followed immediately by the instruction: "Now, if you find that the defendant made that confession, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it." State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

Comparative Amount of Time Devoted to Instructions. — Just as the mere fact that the judge may spend more time summarizing the evidence for the State does not amount to an expression of opinion, no expression of opinion arises merely from the comparative amount of time devoted to giving an instruction. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

Instruction Calling for Judge to Express an Opinion Properly Refused. — In a trial in which the defendant claimed to have multiple personalities, the trial court could not, as the defense requested, instruct the jury that the person sitting at the defense table was not "James Woodard," but instead was "Johnny Gustud" (the defendant's "alternate personality"). If the judge had done so, he would have impermissibly expressed his opinion as to whether the defendant in fact had multiple personalities. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

A colloquy between the trial judge and the district attorney did not constitute an expression of opinion on any fact to be proved in the case and therefore did not constitute a violation of this section. State v. Alston, 111 N.C. App. 416, 432 S.E.2d 385 (1993).

Instructions by Trial Court Not Improper. — It was not error for trial court to instruct the jury that assault on a female with intent to commit rape was by definition a felony involving the use or threat of violence to the person. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Prejudicial Error Not Shown. — The trial court's refusal to allow defendant to use a weapon to demonstrate his testimony was not error where the court could reasonably have concluded that such action might jeopardize the safety of those in the courtroom and the continued presence of the defendant. State v. Ford, 323 N.C. 466, 373 S.E.2d 420 (1988).

Although comments made by the trial court in the presence of the jury in reaction to a delay caused by the temporary absence of a defense witness who left to go to the bathroom were less than exemplary, the comments did not rise to the level of error. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Trial court's comments did not intimate to the jurors that the trial court believed the evidence to justify verdicts of guilty of first-degree murder, which might necessitate the alternate juror's presence at a capital sentencing proceeding. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

Applied in State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988); State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990); State v. Williams, 98 N.C. App. 68, 389 S.E.2d 830 (1990); State v. Redfern, 98 N.C. App. 129, 389 S.E.2d 846 (1990); State v. Martin, 105 N.C. App. 182, 412 S.E.2d 134 (1992); State v. McKoy, 331 N.C. 731, 417 S.E.2d 244 (1992); State v. Long, 113 N.C. App. 765, 440 S.E.2d 576 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995); State v. Campbell, 340 N.C. 612, 460 S.E.2d 144 (1995); State v. Burke, 342 N.C. 113, 463 S.E.2d 212 (1995).

Cited in State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995); State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995); State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996).

II. QUESTIONS BY TRIAL JUDGE.

Clarification of Testimony. — Where the record clearly revealed that victim was confused by questions of both the district attorney and defendant's attorney, and in each instance the judge questioned the victim in an attempt to clear up her confusing testimony, and the questions propounded by the judge in no way expressed any opinion as to the witness' credibility, the defendant's guilt, or as to a factual controversy that was to be resolved by the jury, there was no error. State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

The trial judge is permitted to interrogate witnesses, whether called by itself or by a party, under § 8C-1, Rule 614(b), but may not express during any stage of the trial any opinion in the presence of the jury on any question of fact to be decided by the jury. However, in fulfilling the duties of a trial judge to supervise and control the course of a trial so as to insure justice to all parties, the judge may question a witness in order to clarify confusing or contradictory testimony. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Questions by judge to expert witness did not denigrate either defendant's witness or her evidence, but instead helped to develop testimony favorable to the defense and assist the trial court in its task of deciding whether mitigating circumstances which might later be requested by the defense were in fact supported by the evidence. State v. Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994), cert. denied, — U.S. —, 116 S. Ct. 111, 133 L. Ed. 2d 63 (1995).

Prejudicial Actions by Judge. — The jury could reasonably infer from the trial court's action in turning his back to defendant and the jury during defendant's testimony that the trial judge did not believe defendant's testimony to be credible and this action was sufficiently prejudicial to require a new pretrial. State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622, stay granted pending appeal, 336 N.C. 784, 447 S.E.2d 435, cert. denied, temporary stay dissolved, 337 N.C. 804, 449 S.E.2d 752 (1994).

Questioning Held Not Improper. — Questioning by the trial judge was not improper where the judge's inquiry constituted neither an expression of opinion as to the guilt or innocence of the defendant nor a suggestion of alliance with the prosecution. State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991).

No reasonable juror would have interpreted the question "If chosen to sit as a juror will you require the state to satisfy you of the defendant's guilt beyond a reasonable doubt before you find him guilty?" as indicating an opinion of the court. State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995).

Remark Held Not Improper. — There was no error where a remark by the court was a mere lapsus linguae that did not prejudice the defendant. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, — U.S. —, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Where judge's questioning related to witness' expertise and comprised a part of the trial court's ascertainment of his qualifications as an expert witness, since witness' testimony generated some confusion regarding the various locations of his training, the trial court's questions were fairly designed to clarify this testimony and not expression of judge's opinions. State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988).

Court Erred by Asking Question Conveying to Jury It Did Not Believe Witness. — The trial court erred in asking expert witness "Are you telling the truth now or were you telling the truth then?" which clearly conveyed to the jury that the trial court did not believe this witness was being truthful; the trial court had invaded the province of the jury to determine the credibility of the witness. State v. Gregory, 341 N.C. 365, 459 S.E.2d 638 (1995).

§ 15A-1223. Disqualification of judge.

CASE NOTES

Trial judge's alleged opinions regarding the crime of driving while impaired did not constitute proper grounds to require the judge to recuse himself. State v. Kennedy, 110 N.C. App. 302, 429 S.E.2d 449 (1993).

Insufficient Evidence to Question Judge's Objectivity. — Where at the hearing on the motion to recuse, defendant produced no evidence of any bias other than her attorney's recollection that the judge had made the statement that "that car is gone" during a forfeiture proceeding, there was not substantial evidence that might reasonably call the judge's objectivity into question. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

Quoted in In re Nakell, 104 N.C. App. 638, 411 S.E.2d 159 (1991).

Cited in State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989); State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993).

§ 15A-1225. Exclusion of witnesses.

CASE NOTES

The aim of sequestration is twofold, etc. —
While it is true that one of the purposes for requiring sequestration is to prevent witnesses from tailoring their testimony from that of earlier witnesses, in order to show error a defendant must show that the trial court abused its discretion. State v. Pittman, 332 N.C. 244, 420 S.E.2d 437 (1992).

Presence of Social Worker and Therapist During Rape Victim's Testimony. — The trial court did not abuse its discretion by allowing a social worker and a therapist to remain in the courtroom during the victims' testimony in rape trial. State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994).

Applied in State v. Batts, 93 N.C. App. 404, 378 S.E.2d 211 (1989).

Quoted in State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993).

Cited in State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); Davis v. Public Schs., 115 N.C. App. 98, 443 S.E.2d 781, cert. denied, 337 N.C. 690, 448 S.E.2d 519 (1994).

§ 15A-1226. Rebuttal evidence; additional evidence.

CASE NOTES

This section is clear authorization for a trial judge, within his discretion, to permit a party to introduce additional evidence at any time prior to the verdict; the judge may also permit a party to offer new evidence which could have been offered in the party's case in chief or during a previous rebuttal as long as the opposing party is permitted further rebuttal. State v. Quick, 323 N.C. 675, 375 S.E.2d 156 (1989).

Scope of Testimony. — Where witnesses' testimony on redirect examination went beyond the scope of her testimony during direct and cross-examination but the testimony was relevant and otherwise admissible and after its admission, the trial court provided the defendant an opportunity to recross-examine the witness, the trial court did not abuse its discretion. State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

Stated in State v. Simpson, 327 N.C. 178, 393 S.E.2d 771 (1990).

Cited in State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

§ 15A-1227. Motion for dismissal.

CASE NOTES

I. General Consideration.
III. Evidence on Motion.
  A. In General.

I. GENERAL CONSIDERATION.

Defendant's Motion Must Be Denied, etc. —
If there is substantial evidence-whether direct, circumstantial, or both-to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Applied in In re Lucas, 94 N.C. App. 442, 380 S.E.2d 563 (1989); State v. Outlaw, 96 N.C. App. 192, 385 S.E.2d 165 (1989); State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136; State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991); State v. Roddey, 110 N.C. App. 810, 431 S.E.2d 245 (1993).

Cited in State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988); State v. Young, 103 N.C. App. 415, 406 S.E.2d 3

(1991); State v. Barnes, 110 N.C. App. 473, 429 S.E.2d 765 (1993); State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (1995).

III. EVIDENCE ON MOTION.

A. In General.

Substantial Evidence Must Be Shown, etc. —

In accord with third paragraph in the main volume. See State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

In order to overcome a motion to dismiss, the State must introduce more than a scintilla of evidence of each essential element of the offense and that the defendant was the perpetrator of the offense. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Evidence Must Be Considered, etc. —

In accord with second paragraph in the main volume. See State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

In accord with fourth paragraph in the main volume. See State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Inconsistencies in the state's evidence were for the jury to weigh and consider. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

§ 15A-1228. Notes by the jury.

Except where the judge, on the judge's own motion or the motion of any party, directs otherwise, jurors may make notes and take them into the jury room during their deliberations. (1977, c. 711, s. 1; 1993, c. 498, s. 1.)

CASE NOTES

Stated in State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990).

§ 15A-1229. View by jury.

CASE NOTES

Jury Assembled as a Single Body Not Required. — There is no requirement, constitutional or otherwise, that the defendant in a capital case be in the presence of all members of the jury, assembled as a single body, throughout a jury view of the scene of the crime. State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993).

Where members of the jury were permitted to roam freely about the home where a murder was committed and were not held together as a body to inspect the premises, defendant's state constitutional rights to be present at all stages of his capital trial were not violated. State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993).

Judge's reason for allowing the jury view of a restaurant where murders occurred was valid where judge wanted to allow jurors an improved understanding of the size, dimensions, and configuration of the restaurant. State v. French, 342 N.C. 863, 467 S.E.2d 412 (1996).

§ 15A-1230. Limitations on argument to the jury.

CASE NOTES

The permissible scope of counsel's closing argument to the jury is not unlimited and the trial judge may limit the argument of counsel within his discretion. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

Prosecutors are granted wide latitude in the scope of their argument. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Remarks Held Not To Necessitate Ex Mero Motu Correction. — Remarks by prosecutor during summation were improper in that they equated an adverse ruling regarding the admission of certain evidence with an effort on defendant's part to obscure the truth; however, they were not of the magnitude or character to require that the verdict be set aside, as improprieties during closing arguments, left unchallenged by defendant, must be gross indeed for it to be held that the trial court abused its discretion in not recognizing and correcting ex mero motu the comments regarded by defendant as offensive only on appeal. State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

The prosecutor's argument that if defendant was found not guilty, "justice in Halifax County will be dead[,]" was not an improper argument. This argument was a hyperbolic expression of the State's position that a not guilty verdict, in light of the evidence of guilt, would be an injustice. State v. Pittman, 332 N.C. 244, 420 S.E.2d 437 (1992).

Unless the defendant objects, the trial court is not required to interfere ex mero motu unless the arguments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Argument as Reasonable Inference from the Record. — Where a prosecutor referred to the fact that, when arrested, defendant was found in the woods fifty yards from the place at which he and two witnesses were standing when the police arrested the witness about ninety minutes earlier, the prosecutor's argument that this action demonstrated a consciousness of guilt was a reasonable inference from the record. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Prosecutor's Remarks Justified by Brutality of Crime. — Considering the brutality of the crime and that the state was seeking a recommendation of death, prosecutor's statements such as "Sitting over there is probably one of the most brutal, vicious murderers in the history of (this) County" and "Is there ever a murder enough to call for the death penalty if this isn't one?" were not grossly improper; the jury would have understood the prosecutor's remarks to address the severity of the crime before them. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, — U.S. —, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995).

It was not prejudicial error for the prosecuting attorney to argue that medical expert was paid for testifying when there was no evidence that the medical expert had been paid anything because it is well known that physicians are paid for their work, and the fact that the medical expert might have been paid need not imply that he would not testify truthfully; therefore, the defendant did not show there was a reasonable possibility there would have been a different result if the argument had not been made. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

Reference to Witnesses' Show of Emotion. — Viewed in context, a reference to a witness' show of emotion on the stand was not a bid for sympathy but instead a small portion of counsel's lengthy discussion of credibility issues; this discussion encouraged an assessment of the relative credibility of each and every witness based on many factors, including demeanor on the witness stand. The demeanor of witnesses was a matter before the jury and may have legitimately been argued to them, and in the absence of a contemporaneous objection by defendant, the court did not find that the prosecutor's remarks warranted intervention by the trial judge. State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Improper Argument of Facts Outside Record. — Defense counsel acted improperly where he urged the jurors to base their decision on reasons not based on the mitigating and aggravating evidence presented at the sentencing proceeding. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, — U.S. —, 115 S. Ct. 2566, 132 L. Ed. 2d 818 (1995).

Arguments Outside Record Were Not Improper. — District attorney's statement that ninety-five percent (95%) of murderers would be free if intoxication was defense was obvious hyperbole related to the fact that voluntary intoxication is generally no defense to crime and his statement that politicians have talked about building new stretch of road was related to well-known fact it is difficult to travel on mountain roads that are covered with snow. State v. Rogers, 323 N.C. 658, 374 S.E.2d 852 (1989).

Use of Widely Held Opinions Was Proper. — Although prosecutor did express his opinions that county should be decent, safe and law-abiding, that drug abuse is bad, that young people should be warned about drug abuse, and that a person's home is his castle, the opinions were ones which are widely held, and it was not error to allow prosecuting attorney to use them as premises for his argument. State v. Rogers, 323 N.C. 658, 374 S.E.2d 852 (1989).

Replay of Videotaped Statements. — Trial court did not abuse its discretion by disallowing replay of excerpts from videotaped statements during defendant's closing argument, as the two-hour videotape containing these statements was shown to the jury during the trial in its entirety. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

Argument Held Not Improper. — A prosecutor's argument is not improper when it is consistent with the record and does not travel into the fields of conjecture or personal opinion. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Where a prosecutor stated that a murder was "a first degree murder of one of the most heinous kind I have ever come into contact with" and that defendant frightened him, these infusions of the prosecutor's personal opinion were improper, but they were not so grossly improper as to require a new trial. The evidence supported the characterization of the murder as heinous. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

A statement that defendant frightened the prosecutor was not, standing alone, so prejudicial as to make a fair trial impossible. The trial court remedied any possible prejudice from these statements by admonishing the jurors to disregard any personal opinions any attorney may have expressed during closing argument. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Permissible Inferences. — Where there was sufficient evidence adduced to support an inference that the victim was either standing with his back turned to defendant or was attempting to flee when he was shot and the medical examiner testified that the victim was shot three times, once in the abdomen and twice in the back, the State acted properly in arguing permissible inferences from this evidence. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

Impropriety Cured. — Where, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Where defendant objected to the prosecutor's statement that "because of his age, no matter what you do, Johnny Small won't stay in prison forever," because the trial court immediately instructed the jury to disregard that portion of the prosecutor's argument, the impropriety was cured. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Applied in State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989); State v. Wilson, 335 N.C. 220, 436 S.E.2d 831 (1993).

Quoted in State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990).

Cited in State v. Oxendine, 330 N.C. 419, 410 S.E.2d 884 (1991); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994); State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, — U.S. —, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995); State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996).

§ 15A-1231. Jury instructions.

Legal Periodicals. —
For article, "Jury Instructions: A Persistent Failure to Communicate," see 67 N.C.L. Rev. 77 (1988).

CASE NOTES

Unrecorded Conference Without Defendant. — Where the trial court held an informal charge conference in the absence of the jury and off the record, but defendant could not show how he was materially prejudiced by the failure to record testimony there was no error. State v. Brunson, 120 N.C. App. 571, 463 S.E.2d 417 (1995).

Failure to Record Bench Conferences and In-Chamber Proceedings. — Although trial court's partial denial of defendant's motion for complete recordation, insofar as it precluded recordation of bench conferences and in-chamber proceedings relating to jury instructions, may have constituted error under the applicable statutes, defendant was not prejudiced as a result thereof. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

The trial court invited defense counsel to state its objections to the court's proposed instructions and defense counsel took full advantage of its opportunity to do so. Thus, defendant failed to demonstrate how he was materially prejudiced by two earlier unrecorded charge conferences. State v. Pittman, 332 N.C. 244, 420 S.E.2d 437 (1992).

Where defendant makes a timely written request for a listing in writing on the form of possible nonstatutory mitigating circumstances that are supported by the evidence and which the jury could reasonably deem to have mitigating value, the trial court must put such circumstances in writing on the form. Absent such a request, the failure of the trial court to list in writing such mitigating circumstances on the form is not error. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990), holding that this rule shall only be applied prospectively to all capital cases tried after the certification date of the court's opinion.

Failure to Submit Nonstatutory Mitigating Factor in Writing. — Because failure to submit a nonstatutory mitigating circumstance is subject to a harmless error analysis, a fortiori, failure to include such circumstances in writing on the form is also subject to the harmless error rationale. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where only two mitigating circumstances were put in writing on the issues and recommendation form, and the nonstatutory mitigating circumstances which defendant requested to be put in writing on the form were only named orally by the trial court to the jury, the mitigating circumstances were not susceptible of equal consideration by the jury, and the jury could easily have believed that the unwritten circumstances were not as worthy as those in writing. Thus, as there was a reasonable possibility that had the error not occurred, a different result would have been reached at the sentencing hearing, the case would be remanded for a new sentencing hearing. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Applied in State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990); State v. Phillips, 328 N.C. 1, 399 S.E.2d 293; State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Cited in State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989); State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

Legal Periodicals. —
For article, "Jury Instructions: A Persistent Failure to Communicate," see 67 N.C.L. Rev. 77 (1988).

CASE NOTES

- I. General Consideration.
- II. Expression of Opinion.
  - A. In General.
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  - C. Remarks Concerning Witnesses.
  - F. Rulings on Witnesses and Evidence.
- III. Jury Instructions.
  - A. In General.
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    - 3. Lesser and Included Offenses.
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    - 1. In General.
  - F. Instructions as to Particular Offenses.

I. GENERAL CONSIDERATION.

Applied in State v. Drayton, 323 N.C. 585, 374 S.E.2d 262 (1988); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745

(1989); State v. Liner, 98 N.C. App. 600, 391 S.E.2d 820 (1990); State v. McKoy, 331 N.C. 731, 417 S.E.2d 244 (1992).

Quoted in State v. Autry, 101 N.C. App. 245, 399 S.E.2d 357 (1991).

Cited in State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989); State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. Jeffries, 333 N.C. 501, 428 S.E.2d 150 (1993); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Hatcher, 117 N.C. App. 78, 450 S.E.2d 19 (1994), appeal dismissed, cert. denied, 339 N.C. 618, 454 S.E.2d 261 (1995); State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995); State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995); State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995).

II. EXPRESSION OF OPINION.

A. In General.

Prohibitions Against Expression of Opinion Mandatory. — The statutory prohibitions against expressions of opinion by the trial court contained in § 15A-1222 and this section are mandatory. State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

Expression of Legal Theory in Relation to Verdict Form. — Where verdict form submitted to jury proposed two possible verdicts, "Guilty of Murder in the First Degree by Aiding and Abetting," or "Not Guilty," expression of legal theory upon which first degree murder conviction would rest did not place undue emphasis on that choice amounting to expression of opinion of trial judge since § 15A-1237 requires that jury will be given verdict form setting out permissible verdicts recited by judge in his instructions. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

Setting Out the Parties Contentions. — This statute does not prohibit the judge from setting out the parties' contentions; however, when the judge does so, he must give equal stress to the contentions of the State and the defendant. State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), cert. denied, 339 N.C. 617, 454 S.E.2d 261 (1995).

There was no error where a remark by the court was a mere lapsus linguae that did not prejudice the defendant. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, — U.S. —, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Comments Held Harmless. — Trial court's comments did not intimate to the jurors that the trial court believed the evidence to justify verdicts of guilty of first-degree murder, which might necessitate the alternate juror's presence at a capital sentencing proceeding. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

B. Remarks Concerning Parties.

Judge's Statement That Defendant Had "Confessed". — Trial court's statement that the evidence tended to show that defendant had "confessed" that he "committed the crime charged" did not amount to an expression of opinion by the trial court, where evidence had been introduced which in fact tended to show that defendant had confessed to the crime charged, namely, first degree murder, and where, additionally, the trial court's statement was followed immediately by the instruction: "Now, if you find that the defendant made that confession, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it." State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

Instruction Properly Refused. — In a trial in which the defendant claimed to have multiple personalities, the trial court could not, as the defense requested, instruct the jury that the person sitting at the defense table was not "James Woodard," but instead was "Johnny Gustud" (the defendant's "alternate personality"). If the judge had done so, he would have impermissibly expressed his opinion as to whether the defendant in fact had multiple personalities. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

C. Remarks Concerning Witnesses.

Intimation Judge Believed Witness to Have Been a Victim of Abuse. — Where the inescapable implication of the court's reply to the jury's request to rehear testimony of child was that the trial judge believed the minor child to have been a victim of sexual assault, as the court suggested that recounting his testimony would be "very traumatic" and "injurious" to victim, the court violated this section. State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995).

F. Rulings on Witnesses and Evidence.

Opinion as to the Existence of a Material Fact. — Challenged instruction of the trial court which constituted an indirect statement that the apartment and the common areas of sorority house constituted a single "dwelling house" for purposes of application of the burglary statute violated this section by expressing an opinion as to the existence of a material fact. State v. Merritt, 120 N.C. App. 732, 463 S.E.2d 590 (1995).

III. JURY INSTRUCTIONS.

A. In General.

Object of Instructions. —

Regardless of the particular words employed by the trial judge, an instruction is adequate if it accurately presents the applicable principles of law. State v. Bogle, 90 N.C. App. 277, 368 S.E.2d 424, rev'd on other grounds, 324 N.C. 190, 376 S.E.2d 745 (1988).

Required Explanation. —

In instructing the jury, the trial court must declare and explain the law arising on the evidence, state the evidence to the extent necessary to explain the application of the law and refrain from expressing an opinion as to whether or not a fact has been proved. State v. Greenidge, 102 N.C. App. 447, 402 S.E.2d 639 (1991).

Nor upon Subject Not Supported by Evidence. —

In accord with first paragraph in the main volume. See State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988).

When Defendant Entitled to Instruction. —

Since expert testimony regarding defendant's ability to form the specific intent to kill was before the jury, defendant was entitled to a jury instruction on this element of the crimes in question. State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988).

General Statement of Legal Principles, etc. —

Where the instruction that the trial court gave was a general statement to the jury on intent and the method of proving that defendant had formed the specific intent to kill, and where defendant's requested instruction would have allowed the jury to focus on defendant's mental condition as it pertained to his ability to premeditate and deliberate, in light of the centrality of the issue of defendant's state of mind, it was error not to give defendant's instruction, and defendant was entitled to a new trial. State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988).

Instruction Need Not Be Given Exactly as Requested. —

Where defendant's requested instruction stressed that the intent to kill must be formed in a "cold state of blood," and the instructions given emphasized this by stating that the intent to kill must have been formed "in a cool state of mind" and not "during some suddenly aroused passion," they were, in substance, the same; therefore, the court did not err in refusing to give defendant's instruction verbatim. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Request for Further Elaboration on Particular Point. —

Where the trial court determined that the instruction as given adequately explained the law defining felony murder, twice offered to charge them again on this subject and the foreman refused both offers, the error was harmless. State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994).

Court May Summarize Evidence in Its Discretion. — Although a trial court is not required to state, recapitulate, or summarize the evidence or to explain the application of law to the evidence, the court is free to do so in its discretion; however, in so doing, the trial court must be vigilant not to express an opinion as to the quality of the evidence or as to the credibility of a witness. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instruction That Offense Is Felony Involving Violence. — It was not error for trial court to instruct the jury that assault on a female with intent to commit rape is by definition a felony involving the use or threat of violence to the person. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

C. Explanation of Law.

3. Lesser and Included Offenses.

Erroneous Instruction on Lesser Included Offense Not Prejudicial to Defendant. — Although it was error for court to instruct on unsupported lesser degrees of an offense, such error could not have been prejudicial to defendant. State v. Hamad, 92 N.C. App. 282, 374 S.E.2d 410 (1988), aff'd, 325 N.C. 544, 385 S.E.2d 144 (1991).

4. Defenses.

Failure to Instruct Defendant Had No Duty to Retreat. — Because the evidence showed that the victim of a fatal shooting was using deadly force, defendant was permitted to stand his ground and kill the victim if defendant believed it necessary and had a reasonable ground for such belief; thus the trial court erred in failing to instruct that defendant had no duty to retreat and defendant was entitled to a new trial. State v. Nixon, 117 N.C. App. 141, 450 S.E.2d 562 (1994).

D. Summary of Evidence.

1. In General.

Recapitulation of Evidence Within Judge's Discretion. — Trial judges are not required to state, summarize or recapitulate the evidence, although they may elect in their discretion to do so, and the exercise of such discretion will not be reviewed except upon a showing of abuse, and upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990).

Taking More Time to Summarize State's Evidence. — No error was found in the trial court's narration of the evidence where the transcript revealed that although the court's summary of defendant's evidence was shorter than that of the state, it nevertheless clarified the issues and eliminated extraneous matters. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

F. Instructions as to Particular Offenses.

Summary of Evidence in Involuntary Manslaughter Case. — Where, when explaining the law of involuntary manslaughter and applying the evidence to that law the judge stated, "that it was dark...; and that the defendant fired a .22 rifle into the darkness...," this was a fair summary of the evidence, since defendant himself contended it was too dark for him to see when he fired his gun. State v. Parks, 92 N.C. App. 181, 374 S.E.2d 138 (1988), rev'd on other grounds, 324 N.C. 420, 378 S.E.2d 785 (1989).

With respect to stolen property charges, the legal principle of possession of recently stolen property constituted a substantive feature which the court had a duty to discuss in its jury instructions. State v. Quick, 106 N.C. App. 548, 418 S.E.2d 291 (1992), cert. denied, 332 N.C. 670, 424 S.E.2d 415 (1992).

§ 15A-1233. Review of testimony; use of evidence by the jury.

CASE NOTES

This statute imposes two duties upon the trial court, etc. —

This section mandates that the judge fulfill two duties: First, that all the jurors be returned to the courtroom and, second, that the judge exercise discretion in ruling upon the request. State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

This statute imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the trial court must have all jurors present in the courtroom. Second, the trial court must exercise its discretion in determining whether to permit the requested evidence to be read to the jury. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Exercise of Disclosure of Discretion by Trial Court. — The decision to grant or deny a jury request for a review of evidence is committed to the discretion of the trial court; the trial court errs where it does not exercise its discretion in determining whether the jury should be allowed to review the evidence introduced at trial. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

This section authorizes a judge to allow the jury to take into the jury room exhibits and writings which have been admitted into evidence only when the jury so requests and all parties give their consent. State v. Wagner, 343 N.C. 250, 470 S.E.2d 33 (1996).

When the trial court states for the record that, in its discretion, it is allowing or denying a jury's request to review testimony, it is presumed that it does so in accordance with this section. In addition, the trial court must instruct the jury that it must remember and consider the rest of the evidence. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Defendant waived his right to assert, on appeal, the judge's failure to bring the jury to the courtroom, where defendant's lawyer went beyond simply failing to enter an objection and consented to communication procedure. State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

Reading and Reexamining Requested Material. —

Whether to allow a jury's request that previously admitted testimony be read to it lies solely within the discretion of the trial court. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Where jury foreman asked to review the transcript in general, the trial court exercised its discretion and complied with the requirements of this section, when the court explained it would not be fair to give the jury only portions of the testimony taken out of context of the whole trial, and instructed the jury to rely upon their individual recollections to arrive at a verdict. State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994).

Materials Not Received in Evidence. —

Where the jury's question related to a point for which no direct evidence had been introduced, the trial court could not exercise its discretion as to whether to allow the jury to review evidence on that point. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

It is error to allow the jury to take evidence into the jury room, etc. —

By denying the jury's request to hear the testimony of both defendants and prosecution witnesses, and by allowing the jury to take witnesses' written statements, which directly implicated defendant, into the jury room over defendant's objection, there existed a reasonable possibility and a reasonable assumption that the jury may have inadvertently given more weight to witnesses' statements; the trial court's submission of the statements to the jury to take to the jury room over defendant's objection rose to a level of error sufficiently prejudicial to entitle defendant to a new trial. State v. Poe, 119 N.C. App. 266, 458 S.E.2d 242 (1995).

Defendant must consent to request of jury, etc. —

Upon the jury's request for defendant's statement, the trial court permitted the document to be taken into the jury room over defendant's objection. To do so was error. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

Failure to Obtain Party's Consent Was Not Prejudiced. — Although the trial court did not obtain the consent of all of the parties in allowing prosecution witnesses' statement to go to the jury to take to the jury room, defendant was not prejudiced by this error; not only did defendant not object to the jury's request at trial, but witnesses' statement made no reference whatsoever to defendant. State v. Poe, 119 N.C. App. 266, 458 S.E.2d 242 (1995).

Refusal to Allow Jury to See Exhibit Held Not Prejudicial. — The trial court erred in refusing to accede to the jury's request to see an exhibit, and the court misstated the law when it informed the jury that it could only view exhibits during the trial while sitting together in the jury box. However, no prejudice was found by the error where the transcript showed that the jury did not unequivocally demand to see the particular exhibit. See State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The trial court did not abuse its discretion by refusing to allow the jury to review trial testimony as requested by the defendant, when the testimony taken as a whole supported the State's version of the events at issue, and the evidence and exhibits reviewed by the jury were not inconsistent with the testimony not reviewed by the jury. State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

All elements of a trial should be viewed and heard simultaneously by all 12 jurors; to allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreman, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988).

Judge's Communication to Jury by Way of Written Notes. — Judge's communication with jury in the jury room via written notes violated the requirements of subsection (a) of this section; however, where the judge communicated with all jurors, since his notes were delivered to the jury as a whole, there was no violation of the North Carolina Constitution, and defendant failed to show other prejudice. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

Burden on Defendant to Show Abuse of Discretion. — Fact that the trial court granted the jury's request that the testimony of a State's witness be read does not in and of itself constitute prejudicial error. The defendant must show that the trial court abused its discretion. To make the showing, the defendant must demonstrate that the trial court's action was so arbitrary that it could not have been the result of a reasoned decision. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Exercise of Discretion in Denying Jury's Request. — Defendant's argument that the trial judge failed to exercise his discretion in denying the jury's request for portions of the transcript was without merit, where the transcript revealed that three times the trial judge stated that he was denying the request in the exercise of his discretion, and he even referred to the appropriate statute. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Failure to Exercise Discretion Held Not Prejudicial Error. — Although judge may have failed to exercise his discretion in denying jury's request to have portions of transcript read to it, the error was not prejudicial. The testimony requested by the jury was not significant to defendant's defense; this testimony related to events occurring after defendant fired murder weapon, and thus this requested testimony, unlike alibi testimony, would not have exonerated defendant and was not critical to the jury's determination of defendant's guilt. State v. Hanible, 94 N.C. App. 204, 379 S.E.2d 696, cert. denied, 325 N.C. 548, 385 S.E.2d 505 (1989).

Error in Permitting Jury to Take Exhibit to Jury Room Not Prejudicial. — Statement which had been admitted but not read into evidence, which did not contradict the trial testimony on critical points, did not prejudice defendant, although it was error to permit jury to take it to the jury room. State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

Defendant did not show a reasonable possibility that had the jury not been allowed to review photographs of the deceased in the jury room, a different result would have been reached, where the photographs had been previously admitted and shown to the jury to illustrate the testimony of witnesses, and the trial court had the discretion to permit the jury to reexamine the pictures closely and at length in the courtroom. State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

Denial of Jury's Request Held Error. — Where a note the jury sent to the trial judge during deliberations asked, "May the jurors please be permitted to hear victim's testimony again?," and underneath this question were the words, "NO, That is not possible. Judge Saunders," the judge committed reversible error by failing to exercise discretion when he denied the jury's request and by failing to return the jury to the courtroom to receive and respond to their inquiry. State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

Denial of Jury's Request Held Not Error. — The trial court did not err in refusing to grant the jury's request to "review" the testimony of the State's firearm and tool mark identification expert; the court indicated that it was denying the request because it did not want to give undue emphasis to the testimony of any particular witness. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Applied in State v. Hudson, 331 N.C.

122, 415 S.E.2d 732 (1992); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Nelson, 341 N.C. 695, 462 S.E.2d 225 (1995).

Cited in Barnes v. Ford Motor Co., 95 N.C. App. 367, 382 S.E.2d 842 (1989); State v. Talley, 110 N.C. App. 180, 429 S.E.2d 604 (1993).

§ 15A-1234. Additional instructions.

Legal Periodicals. — For article, "Jury Instructions: A Persistent Failure to Communicate," see 67 N.C.L. Rev. 77 (1988).

CASE NOTES

Court's Discretion in Using Exact Language Requested by Counsel. — Whether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Where the trial court instructed the jury in substantial conformity with the defense counsel's request, the court's refusal to give the defendant's special instructions verbatim was not an abuse of discretion. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

A trial court is not required to give a requested instruction in the exact language prayed for. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Giving of Additional Instructions in Response to Inquiry. — Once the jury retires for deliberation, the trial court may give appropriate additional instructions in response to an inquiry made by the jury in open court. When the trial court gives such additional instructions, it may also give or repeat other instructions to avoid giving undue prominence to the additional instructions. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Additional Instructions Upheld. — Where questions asked by jurors indicated a general confusion about the elements of the crime charged, the trial court properly determined that repeating the pertinent portions of its instructions in their entirety would answer all the jury's questions; and as the trial court's additional instructions avoided giving undue prominence to any one of the questions or any part of the instructions, the trial court did not err. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Repeated or Clarified Instructions Are Not Additional Instructions. —

An instruction which is repeated at the jury's request does not constitute an additional instruction within the meaning of subsection (c) of this section. State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1992).

The requirements set forth in subsection (c) do not apply when the court merely repeats a previous instruction; therefore, as long as the trial court is merely repeating a previous instruction, it is not necessary for the judge to give the parties an opportunity to be heard prior to reinstruction. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

Where the trial court merely repeated and clarified instructions it had previously given in its original charge to the jury and did not add substantively to those instructions, it was unnecessary for the trial court to consult with the parties and give them an opportunity to be heard prior to reinstructing the jury. State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996).

Where it did not appear from the jurors' question that they were confused about the burden of proof, nor were additional instructions of a nature to give undue emphasis to the State's case, the judge did not abuse his discretion in denying defendant's request to repeat the instructions. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

On Appeal, No Need to Have Objected at Trial. — Defendant did not have to object at trial in order to pursue his argument concerning this section on appeal. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988).

Failure to Bring Entire Jury to Courtroom to Respond to Jury's Question. — Failure of the trial court to bring the entire jury into the courtroom to respond to the jury's question was reversible error where the court answered only to the jury foreman and the jury foreman struggled in his effort to present the question to the court, thus creating a great opportunity for miscommunication to the remaining jurors to the prejudice of defendant. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988).

The requirement that all jurors be brought to the courtroom helps ensure that the judge understands what the jury has asked. State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989).

All elements of a trial should be viewed and heard simultaneously by all 12 jurors; to allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreman, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. State v. Tucker, 91 N.C. App. 511, 372 S.E.2d 328 (1988).

Defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant. State v. Weddington, 329 N.C. 202, 404 S.E.2d 671 (1991).

Error in Instructing Jury Held Harmless. — Where the trial court determined that instruction as given adequately explained the law defining felony murder and twice offered to charge the jury again on this subject, the error was harmless. State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994).

Applied in State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992); State v. King, 342 N.C. 357, 464 S.E.2d 288 (1995).

Cited in State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992).

§ 15A-1235. Length of deliberations; deadlocked jury.

CASE NOTES

- I. General Consideration.
- II. Instructing Jurors Not to Surrender Convictions.
- III. Comment on Expense of Retrial.

I. GENERAL CONSIDERATION.

The trial court is not required to give instructions listed in subsection (b) upon request, but may give them in its discretion. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Full Instruction Not Required. — It was not error not to give the full instruction set out in this section where the jury never indicated it was deadlocked or that it was having difficulty reaching a unanimous verdict. State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, — U.S. —, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995).

Where the jury never indicated that it was deadlocked or that it was having difficulty reaching a unanimous decision, the court did not err in delivering less than the full instructions set out in this section. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996).

Inquiry as to Jury's Division. — An inquiry as to a division, without asking which votes were for conviction or acquittal, is not inherently coercive. Without more, it is not a violation of the defendant's right to a jury trial. State v. Beaver, 322 N.C. 462, 368 S.E.2d 607 (1988).

Jury Indicated They Were Nearing a Decision. — Where the defendant made his motion for a mistrial after the jury indicated to the trial judge that it was approaching a unanimous verdict, and the trial court, in denying the mistrial motion, considered the nature of the charges, the evidence presented in the trial, and the time spent deliberating up to that point in proportion to the total length of the trial proceedings, the trial court did not abuse its discretion by denying the defendant's mistrial motion based on deadlock. State v. Jones, 110 N.C. App. 169, 429 S.E.2d 597 (1993), cert. denied, 336 N.C. 612, 447 S.E.2d 407 (1994).

Trial judge has no right to coerce a verdict, etc.

The defendant's contention that supplemental instruction which said "[a]ll of us have a considerable amount of time in this case" was coercive was without merit. State v. Green, 336 N.C. 142, 443

S.E.2d 14, cert. denied, — U.S. —, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

The totality of circumstances will be considered in determining whether the jury's verdict was coerced. State v. Beaver, 322 N.C. 462, 368 S.E.2d 607 (1988).

Jury's Verdict Held Not Coerced. — The fact that the jury deliberated for a considerable length of time and into the weekend and that the court made several inquiries of the jury because the jury took as much time as it did in the deliberations did not show there was coercion. State v. Beaver, 322 N.C. 462, 368 S.E.2d 607 (1988).

The trial court's statements that "we've got all the time in the world" and "we've got all week" did not convey the meaning that the trial court would force the jury to continue to deliberate until a verdict was reached, no matter how long it took; the trial court facilitated the necessary deliberation, but it did not force a verdict. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

No Rule as to How Long Jury Should Deliberate. — Although the jury deliberated for four days, while only two days were used for the presentation of evidence, Supreme Court declined to adopt any rule as to how long the jury should be allowed to deliberate which is based on the time required for the State to present evidence; it is left to the discretion of the trial court to decide if jury agreement as to a verdict is reasonably possible. State v. Porter, 340 N.C. 320, 457 S.E.2d 716 (1995).

Cited in State v. Felton, 330 N.C. 619, 412 S.E.2d 344 (1992); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996); State v. Aikens, 342 N.C. 567, 467 S.E.2d 99 (1996).

II. INSTRUCTING JURORS NOT TO SURRENDER CONVICTIONS.

Instruction Held Sufficient. — Instructions were proper where the trial court urged the jury to attempt to reach a unanimous decision but to do so without doing violence to the jurors' individual judgment and cautioned the jurors not to surrender their honest convictions solely because of the opinions of their fellow jurors or merely for the purpose of returning a unanimous decision. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, — U.S. —, 115 S. Ct. 2634, 132 L. Ed. 2d 873, rehearing denied, — U.S. —, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Where the court's abbreviated version of jury instructions under this section conveyed to jurors that they were not to sacrifice their individual beliefs in order to reach a verdict, the abbreviated instruction did not have a prejudicial impact. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996).

III. COMMENT ON EXPENSE OF RETRIAL.

Instruction Held Error. — The trial judge's instruction that the jury should try to reconcile its differences because of the expense of a retrial, given after the foreperson announced they were unable to agree, constituted prejudicial error. State v. Buckom, 111 N.C. App. 240, 431 S.E.2d 776, temporary stay denied, 334 N.C. 435, 433 S.E.2d 185 (1993).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.

CASE NOTES

Admonition to Maintain an Open Mind. — Where the court was simply admonishing the jurors, pursuant to subdivision (a)(3) of this section, to maintain an open mind until they conducted their deliberations, the court was instructed them to resist their natural impulses to reach preliminary conclusions based on the quantity of evidence presented by the opening side. The court further informed the jurors that it was their duty to hear evidence from both sides and to discuss the case among themselves before reaching a conclusion. The instruction, in context, contained no expression of opinion about any question to be decided by the jury or about the weight of the evidence. State v. Harrington, 335 N.C. 105, 436 S.E.2d 235 (1993).

Failure to fully admonish the jury, etc. —

Trial court's failure to admonish the jury regarding their conduct and duties during court recesses was not error, where defendant conceded he did not object, defendant failed to show that he was prejudiced, the trial court did remind the jurors of their duties on several occasions during the trial, as well as referring them to the written instructions, and defendant did not contend that jurors engaged in any improper conduct or conversation or that their deliberations were tainted in any way. State v. Thibodeaux, 341 N.C. 53, 459 S.E.2d 501 (1995).

Allowing jurors to be transported by an unsworn deputy was harmless error; upon discovery of the error, the trial court asked the deputy several questions for the record and the deputy stated that when he transported the jurors he knew nothing about the case but the defendant's name and he had not discussed the facts or circumstances or proceedings of the case with any jury member. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Failure to Sequester Jurors Held Not Prejudicial. — Where the jury was selected from citizens of another county, the trial court quite frequently admonished the jury against discussing the case or gaining information about it from outside sources, and defendant presented no evidence that the jury did anything other than follow the trial court's orders, therefore he failed to show prejudice in the trial court's decision not to sequester jurors. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Excused Juror Allowed in Jury Room. — Subsection (c) of this statute was not violated when the trial court sent a juror who had been excused and replaced, to the jury room after admonishing her not to speak to the others about the case. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Admonition Held Sufficient. — When examined in the context in which they were given, instructions made repeatedly not to discuss the case or form an opinion about it which were delivered to a group of adult men and women were perfectly adequate under this section. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Applied in State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996).

§ 15A-1237. Verdict.

CASE NOTES

Submission of Issue in the Disjunctive. —

Instructions in a disjunctive form on the charge of maliciously assaulting in a secret manner were fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict. State v. Lyons, 330 N.C. 298, 410 S.E.2d 906 (1991).

Disjunctive phrasing of the jury instruction was not a fatal ambiguity which resulted in a nonunanimous jury verdict. State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996).

Instruction Did Not Permit Conviction by Less Than Unanimous Verdict. — Trial judge correctly instructed jury that it could find immoral, improper, or indecent liberty upon a finding that defendant either improperly touched his son or induced his son to touch him; the instruction did not permit conviction by less than a unanimous verdict. State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990).

Applied in State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989).

Cited in State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989); State v. Mayse, 97 N.C. App. 559, 389 S.E.2d 585 (1990); State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991).

§ 15A-1238. Polling the jury.

CASE NOTES

Purpose of Polling. — The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Rationale Behind Polling. — The rationale behind requiring that any polling of the jury be before dispersal is to ensure that nothing extraneous to the jury's deliberations can cause any of the jurors to change their minds. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Right to Have Jury Polled. — The right to a poll of the jury in criminal actions is firmly established by N.C. Const., Art. I, § 24, and by statute. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Waiver of Right to Poll. — When a trial court gave the jury a thirty-minute break, the jury was free to leave the courtroom and go into the streets. During that thirty-minute period, the members of the jury were exposed to influences extraneous to the deliberations of the entire jury as a body. Hence, the jury had been "dispersed" within the meaning of this section, and the motion to poll the jury, made during the jury's recess, came too late. Consequently, the defendant waived the right to poll the jury. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Where the jury dispersed before defendant requested that the jury be polled, defendant waived his right to poll the jury. State v. Ballew, 113 N.C. App. 674, 440 S.E.2d 565, petition denied as to additional issues, 336 N.C. 610, 447 S.E.2d 404 (1994), aff'd, 339 N.C. 733, 453 S.E.2d 865 (1995).

Request for Repolling, etc. — Defendant was not entitled to repoll a juror who had recanted her death sentence recommendations on two of three murder cases when she had twice been polled on her recommendation in the third case; once during normal course of polling after jury's death sentence recommendation in all three cases, and again after she had recanted in two of the cases but had stood by her original decision in the third case. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Change of Mind After Verdict Returned of No Consequence. — If the jury is unanimous at the time the verdict is returned, the fact that some of them change their minds at any time thereafter is of no consequence; the verdict rendered remains valid and must be upheld. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

"Dispersed". — Where jurors chose to return to the jury assembly room, and were told that they could discuss the case with anyone if they so desired, the jury had "dispersed" within the meaning of this section. State v. Ballew, 113 N.C. App. 674, 440 S.E.2d 565, petition denied as to additional issues, 336 N.C. 610, 447 S.E.2d 404 (1994), aff'd, 339 N.C. 733, 453 S.E.2d 865 (1995).

Polling of Jurors Proper. — Where each of the jurors individually was told the charges for which the jury had returned a guilty verdict and was asked whether this was their verdict and whether they still assented to the verdict, there was no error in the manner in which the jury was polled. State v. Ramseur, 338 N.C. 502, 450 S.E.2d 467 (1994).

Cited in State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988); State v. Hedgecoe, 106 N.C. App. 157, 415 S.E.2d 777 (1992).

§ 15A-1240. Impeachment of the verdict.

CASE NOTES

This Section and § 8C-1, Rule 606(b) Do Not Conflict. — Although § 8C-1, Rule 606(b) is broader in some respects than this section, the two do not conflict; the exceptions to the anti-impeachment rule listed in this section are designed to protect the same interests as, and are entirely consistent with, the exceptions in Rule 606(b). State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Jurors May Testify to Objective Events But Not Subjective Effect. — Jurors may testify regarding the objective events listed as exceptions in the statutes, but are prohibited from testifying to the subjective effect those matters had on their verdict. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Juror Testimony on Effect of Extraneous Information Properly Excluded. — Hearing judge did not err by excluding juror testimony regarding how extraneous information affected jury's decision; although the official comment to § 8C-1, Rule 606 suggests that a juror is competent to testify regarding the effect of extraneous prejudicial information upon the jurors' mental processes, the comment inadvertently misstates the rule, since both this section and § 8C-1, Rule 606(b) unambiguously prohibit inquiry into the effect of anything occurring during deliberations upon jurors' minds. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Juror's Failure to Obey Instructions Not to Watch Television Program. — In prosecution for first-degree sexual offense, the defendant was not entitled to relief under this section, even though the foreman of the jury did not obey the instructions of the court and watched the television program on child abuse, where the matters he reported to the jury did not deal with the defendant or with the evidence introduced in the case. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

Writing on Letter Was Extraneous Information and Matter Not in Evidence. — Where, while viewing an exhibit, one of the jurors peeled back the paper over the bottom of defendant's photograph, revealing the words, "Police Department, Wilson, North Carolina — 12291, 12-07-81" and where the jurors discussed the writing on the photograph as evidence that defendant had been in area in December 1981, a fact which, if true, contradicted the testimony of defendant's alibi witnesses, the writing on defendant's photograph was both "extraneous information" within the meaning of § 8C-1, Rule 606(b) and was a "matter not in evidence" which implicated defendant's confrontation right within the meaning of subdivision (c)(1) of this section because it was information dealing with the defendant and the case being tried which reached a juror without being introduced in evidence. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

§ 15A-1241. Record of proceedings.

CASE NOTES

Trial court's failure to order transcript of sentencing hearing did not constitute prejudicial error. In the absence of an abuse of discretion, a judgment will not be disturbed because of either the sentencing procedure or procedural conduct. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

Judge's chance encounters in a corridor with jurors during a recess in defendant's murder trial were not a "proceeding." Therefore, the recordation requirement of this section was not triggered, and defendant's federal constitutional right to due process was not implicated. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

Private Bench Conferences Not "Statements from Bench." — The phrase "statements from the bench" in subsection (a) of this section does not include private bench conferences between trial judges and attorneys. State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992).

Unrecorded Conference with Prospective Jurors Improper. — Trial court's excusal of prospective jurors as a result of its private unrecorded bench conferences with them, violated defendant's state constitutional right to be present at every stage of the trial and violated statutory requirements to make a true, complete and accurate record of the jury selection in a capital trial pursuant to subsection (a) of this section. State v. Smith, 326 N.C. 792, 392 S.E.2d 362 (1990).

Lack of Complete Recordation Harmless. — Based on the record facts and defendant's failure to specifically allege how he was prejudiced by the lack of complete recordation, the trial court's failure to require complete recordation of bench and chamber conferences was harmless beyond a reasonable doubt. State v. Pittman, 332 N.C. 244, 420 S.E.2d 437 (1992).

Although the trial court erred in failing to have its ex parte conferences with prospective jurors recorded, this failure was harmless as it did not deprive defendant of a juror he would have been entitled to or result in the seating of a juror he would have rejected. State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, — U.S. —, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995).

Private Bench Conferences Need Not Be Recorded. — This section does not require recordation of private bench conferences between trial judges and attorneys. State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, — U.S. —, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995).

Substitution of Affidavit Not Adequate. — Where court reporter did not record bench conferences, as required by this section, the court would not substitute this statutory requirement for an affidavit made approximately three years after the event, as the affidavit was not a part of the record made of the trial. State v. McCarver, 329 N.C. 259, 404 S.E.2d 821 (1991).

Quoted in State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994), cert. denied, — U.S. —, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994).

Cited in State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

The inquiry required by this section satisfies constitutional requirements. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, — U.S. —, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

Thorough Examination of Waiver Required. — Where defendant proceeds on a waiver of counsel, this section requires a thorough examination of the waiver. State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757, cert. denied, 330 N.C. 444, 412 S.E.2d 79 (1991).

A thorough inquiry into the three substantive elements of the statute, conducted at a preliminary stage of a proceeding, meets the requirements of this section, even if it is conducted by a judge other than the judge who presides at the subsequent trial. State v. Lamb, 103 N.C. App. 646, 406 S.E.2d 654 (1991).

Procedure upon Indication of Problem with Counsel. —

Only if a defendant clearly expresses his desire to have counsel removed and to proceed pro se is the trial court obligated to make further inquiry pursuant to this section; in the absence of such an expression by defendant of a desire to proceed pro se, when faced with a claim of conflict between defendant and his attorney, the trial court must determine only that the defendant's present counsel is able to render competent assistance and that the nature of the conflict will not render such assistance ineffective. State v. Johnson, 341 N.C. 104, 459 S.E.2d 246 (1995).

Failure to Conduct Inquiry. —

Prejudicial error occurred where judge, without making the mandated inquiry, allowed defendant to speak for himself at a point where his lawyer would most probably have sought a mistrial. State v. Godwin, 95 N.C. App. 565, 383 S.E.2d 234 (1989).

Failure to Record Bench Conferences and In-Chamber Proceedings. — Although trial court's partial denial of defendant's motion for complete recordation, insofar as it precluded recordation of bench conferences and in-chamber proceedings concerning jury instructions, may have constituted error under the applicable statutes, defendant was not prejudiced as a result thereof. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

New Trial Where Judge, etc. —

Where the trial court failed to make any inquiry of defendant concerning whether he understood and appreciated the dangers and disadvantages of self-representation or whether he understood the nature of the charges, proceedings, and the range of permissible punishment he faced and there was nothing in the record which showed defendant understood or appreciated the consequences of proceeding pro se nor was there anything in the record which showed defendant understood the nature of the charges and proceedings and the range of permissible punishments. Having a bench conference with defense counsel was insufficient to satisfy the mandate of this section, therefore, defendant was entitled to a new trial. State v. Pruitt, 322 N.C. 600, 369 S.E.2d 590 (1988).

Presumption from Written Waiver Certified by Court. — When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary. State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757, cert. denied, 330 N.C. 444, 412 S.E.2d 79 (1991).

Defendant knowingly, intelligently, and voluntarily waived her right to counsel where the trial judge explained to the defendant the maximum penalties for the charges against her and emphasized the seriousness of her plight, and defendant stated on several occasions during the judge's explanations that she understood her situation completely, that she did not want counsel to represent her, and that she wanted to represent herself. State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Cited in State v. Davis, 101 N.C. App. 12, 398 S.E.2d 645 (1990).

§ 15A-1243. Standby counsel for defendant representing himself.

CASE NOTES

Standby Counsel Not Sufficient, etc. —

Neither the statutory responsibilities of standby counsel, nor the actual participation of standby counsel is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver. State v. Pruitt, 322 N.C. 600, 369 S.E.2d 590 (1988).

Appointment of standby counsel is a discretionary matter for the trial judge; thus, the standard of review is abuse of discretion. State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Appointment of Court-Appointed Counsel as Standby Counsel Held Proper. — Trial court did not abuse its discretion in appointing as standby counsel, court-appointed counsel removed on motion of defendant, where defendant did not attempt to replace standby counsel, did not question his competence, and conferred with counsel repeatedly during trial. See State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Stated in State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Editor's Note. — Chapter 24, section 14 of the North Carolina Extra Session amended the effective date provisions of Chapter 538, section 56 and Chapter 539, section 1359 of the 1993 Session Laws by changing the effective date of the changes made by those chapters from January 1, 1995 to October 1, 1994. Several sections in this chapter have been affected by this change.

ARTICLE 78.

Order of Commitment to Imprisonment.

§ 15A-1301. Order of commitment to imprisonment when not otherwise specified.

When a judicial official orders that a defendant be imprisoned he must issue an appropriate written commitment order. When the commitment is to a sentence of imprisonment, the commitment must include the identification and class of the offense or offenses for which the defendant was convicted and, if the sentences are consecutive, the maximum sentence allowed by law upon conviction of each offense for the punishment range used to impose the sentence for the class of offense and prior record or conviction level, and, if the sentences are concurrent or consolidated, the longest of the maximum sentences allowed by law for the classes of offense and prior record or conviction levels upon conviction of any of the offenses. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 4; 1993, c. 538, s. 11; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. —

Session Laws 1993, c. 538, s. 11, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

ARTICLE 80.

Defendants Found Not Guilty by Reason of Insanity.

§ 15A-1321. Automatic civil commitment of defendants found not guilty by reason of insanity.

When a defendant charged with a crime is found not guilty by reason of insanity by verdict or upon motion pursuant to G.S. 15A-959(c), the presiding judge shall enter an order finding that the defendant has been found not guilty by reason of insanity of a crime and committing the defendant to a State 24-hour facility designated pursuant to G.S. 122C-252. The court order shall also grant custody of the defendant to a law enforcement officer who shall take the defendant directly to that facility. Proceedings thereafter are in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes. (1977, c. 711, s. 1; 1983, c. 380, s. 3; 1985, c. 589, s. 10; 1987, c. 596, s. 6; 1991, c. 37, s. 1.)

Editor's Note. —

Session Laws 1991, c. 37, s. 1, which amended this section was effective April 16, 1991, and applicable to all hearings and rehearings on discharge or conditional release occurring on or after that date for persons who were found not guilty by reason of insanity of commission of a crime.

Legal Periodicals. —

For note, "State v. Gravette: Is There Justice for Incompetent Defendants in North Carolina?," see 69 N.C.L. Rev. 1484 (1991).

CASE NOTES

For example of proper jury instruction regarding involuntary commitment procedures should defendant be found not guilty by reason of insanity and concomitant responsive argument by district attorney, see State v. Coppage, 94 N.C. App. 630, 381 S.E.2d 169, cert. denied, 325 N.C. 547, 385 S.E.2d 503 (1989), decided prior to 1991 amendment.

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

(a) The criminal judgment entered against a person in either district or superior court shall be consistent with the provisions of Article 81B of this Chapter and contain a sentence disposition consistent with that Article, unless the offense for which his guilt has been established is not covered by that Article.

(b) For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest. (1977, c. 711, s. 1; 1993, c. 538, s. 12; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. — Session Laws 1993, c. 538, s. 12, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

§ 15A-1331A. Forfeiture of licensing privileges after conviction of a felony.

(a) The following definitions apply in this section:

(1) Licensing agency. — Any department, division, agency, officer, board, or other unit of State or local government that issues licenses for licensing privileges.

(2) Licensing privilege. — The privilege of an individual to be authorized to engage in an activity as evidenced by the following licenses: regular and commercial drivers licenses, occupational licenses, hunting licenses and permits, and fishing licenses and permits.

(3) Occupational license. — A licensure, permission, certification, or similar authorization required by statute or rule to practice an occupation or business. The term does not include a tax license issued under Chapter 105 of the General Statutes, Article 7 of Chapter 153A of the General Statutes, or Article 9 of Chapter 160A of the General Statutes.

(b) Upon conviction of a felony, an individual automatically forfeits the individual's licensing privileges for the full term of the period the individual is placed on probation by the sentencing court at the time of conviction for the offense, if:

(1) The individual is offered a suspended sentence on condition the individual accepts probation and the individual refuses probation, or

(2) The individual's probation is revoked or suspended, and the judge makes findings in the judgment that the individual failed to make reasonable efforts to comply with the conditions of probation.

(c) Whenever an individual's licensing privileges are forfeited under this section, the judge shall make findings in the judgment of the licensing privileges held by the individual known to the court at that time, the drivers license number and social security number of the individual, and the beginning and ending date of the period of time of the forfeiture. The terms and conditions of the forfeiture shall be transmitted by the clerk of court to the Division of Motor Vehicles, in accordance with G.S. 20-24 and to the licensing agencies specified by the judge in the judgment. A licensing agency, upon receiving notice from the clerk of court, shall require the individual whose licensing privileges were forfeited to surrender the forfeited license issued by the agency and shall not reissue a license to that individual during the period of forfeiture as stated in the notice. Licensing agencies are authorized to establish procedures to implement this section.

(d) Notwithstanding any other provision of this section, the court may order that an individual whose licensing privileges are forfeited under this section be granted a limited driving privilege in accordance with the provisions of G.S. 20-179.3. (1994, Ex. Sess., c. 20, ss. 1, 5.)

Editor's Note. — This section was amended in the coded bill drafting format. Session Laws 1994, c. 20, s. 5 amended subsection (b), as enacted by s. 1 of c. 20, and without engrossing omitted the phrase beginning "and the judge" at the end of subdivision (b)(2). Subdivision (b)(2) is set out as above at the direction of the Revisor of Statutes.

Session Laws 1994, Extra Session, c. 20, s. 6, makes this section, as enacted by c. 20, s. 1, effective May 1, 1994, and applicable to offenses committed on or after that date.

Session Laws 1994, Extra Session, c. 20, s. 5, which amended this section, was effective on the date that chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses committed on or after that date.

§ 15A-1332. Presentence reports.

(a) Presentence Reports Generally. — To obtain a presentence report, the court may order either a presentence investigation as provided in subsection (b) or a presentence commitment for study as provided in subsection (c).

(b) Presentence Investigation. — The court may order a probation officer to make a presentence investigation of any defendant. The court may order the investigation only after conviction unless the defendant moves for an earlier presentence investigation. A motion for an earlier presentence investigation may be addressed only to the judge of the session of court for which the defendant's case is calendared or, if the case has not been calendared, to a resident superior court judge if the case is in the jurisdiction of the superior court or to the chief district court judge if the case is in the jurisdiction of the district court. When the court orders a presentence investigation, the probation officer must promptly investigate all circumstances relevant to sentencing and submit either a written report or an oral report either on the record or with defense counsel and the prosecutor present. The report may include sentence recommendations only if such recommendations are requested by the court.

(c) Presentence Commitment for Study. — When the court desires more detailed information as a basis for determining the sentence to be imposed than can be provided by a presentence investigation, the court may commit a defendant to the Department of Correction for study for the shortest period necessary to complete the study, not to exceed 90 days, if that defendant has been charged with or convicted of any felony or a Class A1 or Class 1 misdemeanor crime or crimes for which he may be imprisoned for more than six months and if he consents. The period of commitment must end when the study is completed, and may not exceed 90 days. The Department must conduct a complete study of a defendant committed to it under this subsection, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the availability of resources or programs appropriate to the defendant. Upon completion of the study or the end of the 90-day period, whichever occurs first, the Department of Correction must release the defendant to the sheriff of the county in which his case is docketed. The Department must forward the study to the clerk in that county, including whatever recommendations the Department believes will be helpful to a proper resolution of the case. When a defendant is returned from a presentence commitment for study, the conditions of pretrial release which obtained for the defendant before the commitment continue until judgment is entered, unless the conditions are modified under the provisions of G.S. 15A-534(e). (1977, c. 711, s. 1; 1981, c. 377, s. 1; 1993, c. 538, s. 13; 1994, Ex. Sess., c. 24, s. 14(b); 1995, c. 507, s. 19.5(e).)

Editor's Note. — Session Laws 1993, c. 538, s. 13, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, inserted "A1 or Class 1" following "any felony or a" in subsection (c).

§ 15A-1334. The sentencing hearing.

CASE NOTES

I. General Consideration.
II. Evidence.

I. GENERAL CONSIDERATION.

This section — not a part of Article 100 — has no application to capital sentencing proceedings which are conducted pursuant to § 15A-2000. This, the only remnant of the common law right of allocution remaining in capital cases is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, — U.S. —, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Victim impact statements may be used at sentencing hearings, except in capital cases. State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989).

Defendant Was Not Prejudiced by Allowing Victim's Attorney to Address the Court. — Although it was error to allow victim's attorney, who was not called as a witness at the sentencing hearing, to address the court, defendant was not prejudiced by the attorney's summary of defendant's criminal record and the attorney's statement that he thought defendant deserved a jail sentence; defendant's record had already been detailed to the court by the prosecutor and, in light of defendant's history of threats and violence toward his wife and the serious nature of the current charge, the attorney's comment did not contribute to defendant's receiving the sentence he did. State v. Jackson, 119 N.C. App. 285, 458 S.E.2d 235 (1995).

In determining the existence of aggravating factors, the trial court may rely on evidence presented at the sentencing hearing, or, when a defendant pleads guilty, on the circumstances surrounding the offense, including factual allegations contained in the indictment or other criminal process, despite the fact that the State fails to present evidence at sentencing. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

Defendant's Rights Chilled. — Trial judge's statement, that having the defendant in a murder trial testify "would be a big mistake," regardless of the reasoning behind the statement, effectively chilled the defendant's right to testify in his own behalf. State v. Griffin, 109 N.C. App. 131, 425 S.E.2d 722 (1993).

Good Cause Was Not Shown. — Where defendant argued that judge misapprehended the law and believed he had to sentence defendant to consecutive life terms for the rape and sex offense convictions and defendant contended that continuance would have enabled him to present evidence that might have resulted in concurrent rather than consecutive life terms, defendant did not demonstrate good cause to continue hearing since judge did not labor under a mistaken notion that statutes mandated consecutive life sentences for four of defendant's convictions and at hearing, State explicitly asked for consecutive terms, and defendant explicitly asked that sentences run concurrently. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Where the defendant offers no reason why the hearing should not proceed, the trial court does not abuse its discretion in denying the request for a continuance. State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (1996).

No Duty of State to Move for Sentence Following Continuance. — There was no duty of the state to move for the imposition of a sentence within 30 days from the time the prayer for judgment was continued, and when it failed to do so, the court did not lose its jurisdiction to impose a sentence. State v. Absher, 335 N.C. 155, 436 S.E.2d 365 (1993).

Stated in State v. Smallwood, 112 N.C. App. 76, 434 S.E.2d 615 (1993).

II. EVIDENCE.

Informal evidentiary procedures used at sentencing hearing were not dispositive of the question of the credibility of the State's evidence, inasmuch as this section expressly suspends application of the formal rules of evidence to a sentencing hearing. State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989).

§ 15A-1335. Resentencing after appellate review.

CASE NOTES

More Severe Sentence Imposed In Violation of Statute. — Where, in consolidated indictments having equal presumptive terms, as to each indictment involved, the trial court resentenced defendant to a term of years greater than the term of years attributable to the indictment at the original sentence, the trial court violated the Fair Sentencing Act by imposing a more severe sentence at resentencing than was imposed originally. State v. Hemby, 333 N.C. 331, 426 S.E.2d 77 (1993).

Because, as to each indictment involved, the trial court resentenced defendant to a term of years greater than the term of years attributable to the indictment at the original sentence, the trial court violated the Fair Sentencing Act by imposing a more severe sentence at resentencing than was imposed originally. State v. Nixon, 119 N.C. App. 571, 459 S.E.2d 49 (1995).

Resentencing to Comply with Plea Agreement. — Where defendant's original sentence was the result of a negotiated plea agreement, when the trial court determined that an administrative error had been made on the judgments, the trial court did not err by correcting the error and resentencing defendant in compliance with his original plea agreement. State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§§ 15A-1340.1 through 15A-1340.7: Repealed by Session Laws 1993, c. 538, s. 14, effective October 1, 1994.

Cross References. — As to structured sentencing of persons convicted of crimes, see § 15A-1340.10 et seq.

Editor's Note. — Session Laws 1993, c. 538, which repealed this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Prior to its repeal, G.S. 15A-1340.4 had been amended by Session Laws 1994, Extra Session, c. 7, s. 4, and by Session Laws 1994, Extra Session, c. 22, s. 21, both effective May 1, 1994 and applicable to offenses committed on or after that date.

§§ 15A-1340.8, 15A-1340.9: Reserved for future codification purposes.

ARTICLE 81B.

Structured Sentencing of Persons Convicted of Crimes.

Editor's Note. — The case notes in this Article were decided prior to the Structured Sentencing Act which became effective October 1, 1994.

Part 1. General Provisions.

§ 15A-1340.10. Applicability of structured sentencing.

This Article applies to criminal offenses in North Carolina, other than impaired driving under G.S. 20-138.1 and failure to comply with control measures under G.S. 130A-25, that occur on or after October 1, 1994. This Article does not apply to violent habitual felons sentenced under Article 2B of Chapter 14 of the General Statutes. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 22, s. 35; c. 24, s. 14(a), (b); 1993 (Reg. Sess., 1994), c. 767, s. 17.)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 37 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this Part are not abated or affected by the repeal or amendment in this Part of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this Part remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 24, which amended this section, in s. 3 provides: "This act shall be known as the Crime Control and Prevention Act of 1994."

Session Laws 1994, Extra Session, c. 24, s. 71 is a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Legal Periodicals. —

For article, "North Carolina's Fair Sentencing Act: An Ineffective Scarecrow," see 28 Wake Forest L. Rev. 519 (1993).

For note, "State v. Jennings: Public Fervor, the North Carolina Supreme Court, and Society's Ultimate Punishment," see 72 N.C.L. Rev. 1672 (1994).

DECIDED UNDER PRIOR LAW

***Editor's Note.** — The cases cited below were decided under former §§ 15A-1340.1, 15A-1340.4, and 15A-1380.1.*

The Fair Sentencing Act (FSA) specifically provides that it is applicable only to felonies occurring on or after July 1, 1981; accordingly, since the offenses for which defendant was charged and convicted occurred before the effective date of the FSA, the trial court correctly applied pre-FSA law. State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (1994).

Appeal of Sentence Not Exceeding Presumptive Term. — Pursuant to § 15A-1444(a1), a defendant who had entered a plea of guilty to a felony was not entitled to appeal as a matter of right unless his sentence exceeded the presumptive term set by former § 15A-1340.4; however, he could petition for review of the issue by writ of certiorari. State v. Farrior, 117 N.C. App. 429, 451 S.E.2d 332 (1994), cert. granted, 340 N.C. 116, 455 S.E.2d 663 (1995).

Joined Offenses Should Not Be Used as Aggravating Factor. — A sentencing judge may not use a joined or joinable offense in aggravation and this prohibition applies to both convictions for joined offenses and to the acts which form the substance of those joined offenses. State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994), cert. denied and appeal dismissed, 339 N.C. 741, 454 S.E.2d 661 (1995).

Course of Conduct Should Not Have Been Considered Where Offenses Joined. — Where the offenses of first-degree murder and assault with a deadly weapon were joined offenses for which defendant was convicted contemporaneously with his conviction for second-degree murder, a Class C felony covered by the Fair Sentencing Act, finding these offenses to have established a "course of conduct" in aggravation of second-degree murder, violated the prohibition of such factors in State v. Westmoreland, 314 N.C. 442, 334 S.E.2d 223 (1985); therefore, defendant is entitled to resentencing in the second-degree murder case, in which the "course of conduct" aggravating factor will not be considered. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

The Fair Sentencing Act establishes rules which determine what evidence a sentencing judge may consider in aggravating a crime covered by the act; first, a conviction may not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined or by acts which form the gravamen of these convictions; second, evidence used to prove an element of a crime may not also be used to prove a factor in aggravation of that same crime; third, the same item of evidence may not be used to prove more than one factor in aggravation; fourth, acts which could have been, but were not, the basis for other joinable criminal convictions may be used to aggravate the conviction for which defendant is being sentenced; finally, evidence used in proving an element of one crime may also be used to support an aggravating factor of a separate, though joined, crime for which defendant is being sentenced. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

The purpose of sentencing is to punish a criminal with the degree of severity that his culpability merits. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Ordinarily, a resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

Judge Must Consider, etc. —

In accord with second paragraph in the main volume. See State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

If the trial court imposes a sentence greater than the presumptive term for any conviction, it must consider each of the aggravating and mitigating factors under the Fair Sentencing Act for each of defendant's convictions, and make written findings of fact concerning the factors and whether one set of factors outweighs the other. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Consideration of Victim Impact Statements. — While receiving victim impact statements advocating a sentence is "a practice not to be encouraged," the practice does not constitute reversible error. State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994), cert. denied and appeal dismissed, 339 N.C. 741, 454 S.E.2d 661 (1995).

Findings of Factors of Aggravation and Mitigation Required. — Where the conviction for the sale of cocaine, a Class H felony, has a presumptive term of three years and the trial court imposed a 10-year sentence, findings of factors in aggravation and mitigation were required. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

When Statutory Factor Must Be Found. — Sentencing court is required to find a statutory factor only when the evidence supporting that factor is uncontradicted, substantial, and manifestly credible. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Findings Not Required After Guilty Plea. — Where defendant pled guilty pursuant to a plea arrangement as to sentence, the trial court was not required to make finding as to aggravating or mitigating factors. State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437, cert. denied, 338 N.C. 523, 452 S.E.2d 823 (1994).

But this section does not require that only aggravating or mitigating factors listed therein be considered.

This section does not limit a trial judge to the aggravating and mitigating factors enumerated herein. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Although pecuniary gain is not a factor enumerated, this section does not limit a trial judge to the aggravating and mitigating factors enumerated herein, and the question whether to increase the sentence above the presumptive term remains within the trial court's discretion. State v. Barnes, 116 N.C. App. 311, 447 S.E.2d 478 (1994).

Age of Defendant. — The fact that defendant was 17 years old, without more, did not classify defendant as immature under the statute. State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994).

Evidence Proving Offense Not Properly Used to Aggravate Sentence. — As evidence necessary to prove the offense may not be used to prove any factor in aggravation, where the evidence that the defendant took a deadly weapon with him into the victim's neighborhood was so closely connected to the evidence possibly used by the jury to find that the killing was done with malice, it was error for the trial court to consider the use of the pistol again in sentencing. State v. Swann, 115 N.C. App. 92, 443 S.E.2d 740 (1994).

Age as an Aggravating Factor When an Element of the Offense. — Where age is an element of the offense, as with taking indecent liberties with children, if the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime committed against him than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. If, however, the evidence shows that the victim was not more vulnerable than any other victim of the same crime would have been, the statutory aggravating factor that the victim was "very young" cannot properly be found. State v. Farlow, 336 N.C. 534, 444 S.E.2d 913 (1994).

Factors which would mitigate a sentence if present, cannot be used in aggravation if absent. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

All circumstances which are transactionally related, etc. — The trial court must consider all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing, provided that they are not essential to the establishment of elements of the offense. This is so regardless of whether such factors were specifically listed under former § 15A-1340.4(a)(1), and regardless of whether the State specifically requests a finding in this regard. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

Aggravating Factor Not Shown. — Where the record did not support the court's conclusion that defendant committed the crimes for pecuniary gain, the court erred in finding pecuniary gain as an aggravating factor. State v. Barnes, 116 N.C. App. 311, 447 S.E.2d 478 (1994).

Presumption Evidence Sufficient to Aggravate Sentence. — Absent any indication to the contrary in the record, the Supreme Court will presume the trial court in making its findings of fact relied only on evidence which was proper to consider. Thus, without any indication in the record to the contrary, the Supreme Court will presume that the trial court did not improperly aggravate the sentence with evidence necessary to prove the crime. State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994).

Separate Factors in Aggravation Cannot Be Found on the Same Evidence. — The trial court improperly found two factors in aggravation based upon the same evidence. Therefore, defendant was entitled to a new sentencing hearing on his convictions for burglary and kidnapping. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Where the trial court found in aggravation of the defendant's conspiracy conviction that the offense was committed to disrupt the lawful exercise of a governmental function or the enforcement of laws and that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws and the trial court used the same item of evidence — that the defendant had conspired to murder a law enforcement officer who was interfering with their drug trade — as the basis for finding both aggravating factors, constituted error. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

Judge Held Not Required to Find Aggravating and Mitigating Factors. — Where defendant was charged, convicted and sentenced for four separate violations of § 14-100, the trial judge was not required to find aggravating and mitigating factors in sentencing defendant, even though charges against defendant were consolidated for trial and for hearing on judgments, as they were not consolidated for judgment and thus did not exceed maximum ten-year term for the offense. State v. Bresse, 101 N.C. App. 519, 400 S.E.2d 73, cert. denied, 329 N.C. 272, 407 S.E.2d 842 (1991).

No Right of Appeal Where Findings Not Required. — Since the court was not required under former § 15A-1340.4(b) to make findings of aggravating and mitigating factors to support the sentence imposed, defendant had no appeal as of right pursuant to § 15A-1444(a1). State v. Washington, 116 N.C. App. 318, 447 S.E.2d 799 (1994).

§ 15A-1340.11. Definitions.

The following definitions apply in this Article:

(1) Active punishment. — A sentence in a criminal case that requires an offender to serve a sentence of imprisonment and is not suspended. Special probation, as defined in G.S. 15A-1351, is not an active punishment.

(2) Community punishment. — A sentence in a criminal case that does not include an active punishment or an intermediate punishment.

(3) Day-reporting center. — A facility to which offenders are required, as a condition of probation, to report on a daily or other regular basis at specified times for a specified length of time to participate in activities such as counseling, treatment, social skills training, or employment training.

(4) Electronic monitoring. — A condition of probation in which the offender is required to remain in one or more specified places for a specified period or periods each day, and in which the offender shall wear a device which permits the supervising agency to monitor the offender's compliance with the condition electronically.

(5) Intensive probation. — Probation that requires the offender to submit to supervision by officers assigned to the Intensive Probation Program established pursuant to G.S. 143B-262(c), and to comply with the rules adopted for that Program.

(6) Intermediate punishment. — A sentence in a criminal case that places an offender on supervised probation and includes at least one of the following conditions:
a. Special probation as defined in G.S. 15A-1351(a).
b. Assignment to a residential program.
c. Electronic monitoring.
d. Intensive probation.
e. Assignment to a day-reporting center.

In addition, a sentence to regular supervised probation imposed pursuant to a community penalties plan as defined in G.S. 7A-771(2) is an intermediate punishment, regardless of whether any of the above conditions is imposed, if the plan is accepted by the court and the plan does not include active punishment.

(7) Prior conviction. — A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:
a. In the district court, and the person has not given notice of appeal and the time for appeal has expired; or
b. In the superior court, regardless of whether the conviction is on appeal to the appellate division; or
c. In the courts of the United States, another state, the armed services of the United States, or another country, regardless of whether the offense would be a crime if it occurred in North Carolina,

regardless of whether the crime was committed before or after the effective date of this Article.

(8) Residential program. — A program in which the offender, as a condition of probation, is required to reside in a facility for a specified period and to participate in activities such as counseling, treatment, social skills training, or employment training, conducted at the residential facility or at other specified locations. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 14, s. 17; c. 24, s. 14(b).)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c.

14, s. 17, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

DECIDED UNDER PRIOR LAW

Editor's Note. *— The cases cited below were decided under former §§ 15A-1340.1, 15A-1340.4, and 15A-1380.1.*

A conviction of driving while impaired under § 20-138.1, irrespective of the level of punishment imposed, constitutes a prior conviction of an offense punishable by more than sixty days' imprisonment for purposes of sentencing under the Fair Sentencing Act. State v. Santon, 101 N.C. App. 710, 401 S.E.2d 117 (1991).

Time of Prior Conviction. — Based on former § 15A-1340.2(4), at a resentencing hearing, a judge could aggravate a sentence under former § 15A-1340.4(a)(1) with a conviction that was entered after defendant's conviction and first sentencing on April 5, 1991, but before his resentencing on December 9, 1993. State v. Mixion, 118 N.C. App. 559, 455 S.E.2d 904 (1995).

§ 15A-1340.12. Purposes of sentencing.

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Part 2. Felony Sentencing.

§ 15A-1340.13. Procedure and incidents of sentence of imprisonment for felonies.

(a) Application to Felonies Only. — This Part applies to sentences imposed for felony convictions.

(b) Procedure Generally; Requirements of Judgment; Kinds of Sentences. — Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14. The sentence shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment.

(c) Minimum and Maximum Term. — The judgment of the court shall contain a minimum term of imprisonment that is consistent with the class of offense for which the sentence is being imposed and with the prior record level for the offender. The maximum term of imprisonment applicable to each minimum term of imprisonment is, unless otherwise provided, as specified in G.S. 15A-1340.17. The maximum term shall be specified in the judgment of the court.

(d) Service of Minimum Required; Earned Time Authorization. — An offender sentenced to an active punishment shall serve the minimum term imposed. The maximum term may be reduced to, but not below, the minimum term by earned time credits awarded to an offender by the Department of Correction or the custodian of the local confinement facility, pursuant to rules adopted in accordance with law.

(e) Deviation from Sentence Ranges for Aggravation and Mitigation; No Sentence Dispositional Deviation Allowed. — The court may deviate from the presumptive range of minimum sentences of imprisonment specified for a class of offense and prior record level if it finds, pursuant to G.S. 15A-1340.16, that aggravating or mitigating circumstances support such a deviation. The amount of the deviation is in the court's discretion, subject to the limits specified in the class of offense and prior record level for mitigated and aggravated punishment. Deviations for aggravated or mitigated punishment are allowed only in the ranges of minimum and maximum sentences of imprisonment, and not in the sentence dispositions specified for the class of offense and prior record level, unless a statute specifically authorizes a sentence dispositional deviation.

(f) Suspension of Sentence. — Unless otherwise provided, the court shall not suspend the sentence of imprisonment if the class of offense and prior record level do not permit community or intermediate punishment as a sentence disposition. The court shall suspend the sentence of imprisonment if the class of offense and prior record level require community or intermediate punishment as a sentence disposition. The court may suspend the sentence of imprisonment if the class of offense and prior record level authorize, but do not require, active punishment as a sentence disposition.

(g) Dispositional Deviation for Extraordinary Mitigation. — Except as provided in subsection (h) of this section, the court may impose an intermediate punishment for a class of offense and prior record level that requires the imposition of an active punishment if it finds in writing all of the following:

(1) That extraordinary mitigating factors of a kind significantly greater than in the normal case are present.
(2) Those factors substantially outweigh any factors in aggravation.
(3) It would be a manifest injustice to impose an active punishment in the case.

The court shall consider evidence of extraordinary mitigating factors, but the decision to find any such factors, or to impose an intermediate punishment is in the discretion of the court. The extraordinary mitigating factors which the court finds shall be specified in its judgment.

(h) Exceptions When Extraordinary Mitigation Shall Not Be Used. — The court shall not impose an intermediate sanction pursuant to subsection (g) of this section if:

(1) The offense is a Class A or Class B1 felony;
(2) The offense is a drug trafficking offense under G.S. 90-95(h) or a drug trafficking conspiracy offense under G.S. 90-95(i); or

(3) The defendant has five or more points as determined by G.S. 15A-1340.14. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 14, ss. 18, 18.1, 19; c. 22, s. 9; c. 24, s. 14(b); 1995, c. 375, s. 1.)

Editor's Note. — Subsection (g1) was redesignated as subsection (h) at the direction of the Revisor of Statutes.

Session Laws 1993, c. 538, which enacts this Article effective January 1, 1995 (now October 1, 1994), in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act [October 1, 1994] are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, which amended this section, in s. 73 provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "Prosecution for offenses occurring before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 14, ss. 18, 18.1, and 19, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

Session Laws 1994, Extra Session, c. 22, s. 9, which amended this section, was effective on the same date that Chapter 538 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, in subdivision (h)(2) added "or a drug trafficking conspiracy offense under G.S. 90-95(i)".

Legal Periodicals. —

For article, "*State v. Vandiver*: Whither Judicial Discretion under the North Carolina Fair Sentencing Act?," see 67 N.C.L. Rev. 1316 (1989).

Decided Under Prior Law

Editor's Note. — *The cases cited below were decided under former §§ 15A-1340.1 and 15A-1340.4, and 15A-1380.1.*

I. General Consideration.
II. Discretion of Court in Weighing Factors and Imposing Sentence.
III. Sentencing, Generally.
IV. Appellate Review.

I. GENERAL CONSIDERATION.

The Fair Sentencing Act establishes rules which determine what evidence a sentencing judge may consider in aggravating a crime covered by the act; first, a conviction may not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined or by acts which form the gravamen of these convictions; second, evidence used to prove an element of a crime may not also be used to prove a factor in aggravation of that same crime; third, the same item of evidence may not be used to prove more than one factor in aggravation; fourth, acts which could have been, but were not, the basis for other joinable criminal convictions may be used to aggravate the conviction for which defendant is being sentenced; finally, evidence used in proving an element of one crime may also be used to support an aggravating factor of a separate, though joined, crime for which defendant is being sentenced. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

The purpose of sentencing is to punish a criminal with the degree of severity that his culpability merits. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Ordinarily, a resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

Judge Must Consider, etc. —

In accord with second paragraph in the main volume. See State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

If the trial court imposes a sentence greater than the presumptive term for any conviction, it must consider each of the aggravating and mitigating factors under the Fair Sentencing Act for each of defendant's convictions, and make written findings of fact concerning the factors and whether one set of factors outweighs the other. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Weighing of factors in aggravation or mitigation is within the sound discretion of the trial judge, once he determines that the aggravating factors outweigh the mitigating factors, the extent by which the sentence exceeds the presumptive sentence is within his discretion so long as it does not exceed the maximum punishment set by the legislature. State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (1996).

Findings of Factors of Aggravation and Mitigation Required. — Where the conviction for the sale of cocaine, a Class H felony, has a presumptive term of three years and the trial court imposed a 10-year sentence, findings of factors in aggravation and mitigation were required. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

When Statutory Factor Must Be Found. — Sentencing court is required to find a statutory factor only when the evidence supporting that factor is uncontradicted, substantial, and manifestly credible. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

But this section does not require, etc. —

This section does not limit a trial judge to the aggravating and mitigating factors enumerated herein. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Cocaine Addiction. — Where defendant presented no evidence compelling a conclusion that her culpability was significantly reduced by her cocaine addiction, the trial court properly refused to find the addiction as a mitigating factor during sentencing. State v. Wilson, 121 N.C. App. 720, 468 S.E.2d 475 (1996).

Factors which would mitigate a sentence if present, cannot be used in aggravation if absent. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

All circumstances which are transactionally related, etc. —

The trial court must consider all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing, provided that they are not essential to the establishment of elements of the offense. This is so regardless of whether such factors were specifically listed under former § 15A-1340.4(a)(1), and regardless of whether the State specifically requests a finding in this regard. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

Separate Factors in Aggravation Cannot be Found on the Same Evidence. — The trial court improperly found two factors in aggravation based upon the same evidence. Therefore, defendant was entitled to a new sentencing hearing on his convictions for burglary and kidnapping. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Judge Held Not Required to Find Aggravating and Mitigating Factors. — Where defendant was charged, convicted and sentenced for four separate violations of § 14-100, the trial judge was not required to find aggravating and mitigating factors in sentencing defendant, even though charges against defendant were consolidated for trial and for hearing on judgments, as they were not consolidated for judgment and thus did not exceed maximum ten-year term for the offense. State v. Bresse, 101 N.C. App. 519, 400 S.E.2d 73, cert. denied, 329 N.C. 272, 407 S.E.2d 842 (1991).

II. DISCRETION OF COURT IN WEIGHING FACTORS AND IMPOSING SENTENCE.

This Article Did Not Remove, etc. —

The question whether to increase the

sentence above the presumptive term, and if so, to what extent remains within the trial judge's discretion. The sentence will not be disturbed if the record supports the court's determination. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

But Is Within the Discretion, etc. —

It is within the trial court's discretion to determine the weight given to each aggravating or mitigating factor. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

As Is Decision to Impose Sentence, etc. —

Once the trial court determines that an aggravating factor outweighs a mitigating factor, it is within the sound discretion of the trial court to decide the extent to which the sentence may exceed the presumptive term. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Court May Emphasize One Factor, etc. —

In accord with the main volume. See State v. Howard, 99 N.C. App. 347, 393 S.E.2d 139 (1990).

Judge need not justify weight accorded any factor supported by preponderance of evidence. State v. Howard, 99 N.C. App. 347, 393 S.E.2d 139 (1990).

Where the trial judge determined that a single aggravating factor of prior convictions outweighed the two mitigating factors of physical condition and aiding in the apprehension of another felon, there was no abuse of discretion in imposing a 40-year sentence for robbery with a dangerous weapon. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Discretion Not Abused. — Judge's failure to find nonstatutory mitigating factors, even when supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent a showing of an abuse of that discretion. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

Under this section, it was not an abuse of the court's discretion to find that one aggravating factor out-weighed five mitigating factors in light of evidence that supported the conclusion that the defendant conspired to murder her husband. State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, appeal dismissed, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

The trial judge acted within his discretion when he imposed maximum terms of imprisonment with regard to defendant's convictions for breaking or entering into a motor vehicle and felonious larceny, after finding, as aggravating factors, unrelated convictions which had occurred 20 years in the past. State v. Riggs, 100 N.C. App. 149, 394 S.E.2d 670 (1990).

Remand for Resentencing. — When an aggravating factor is incorrect and is overturned on appeal, the trial judge could not properly have balanced the aggravating and mitigating factors, and therefore the case must be remanded for resentencing. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Showing of Atrocity and Cruelty. — There was sufficient evidence to support the trial court's finding that three assaults were heinous, atrocious, or cruel where defendant broke open ex-girlfriend's door and began shooting and all three victims suffered multiple gunshot wounds. The initial act of firing the weapon and injuring the three victims was sufficient to support a conviction for assault with a deadly weapon with intent to kill inflicting serious injury in each case, the additional shots which resulted in further injury to each victim were not necessary to the conviction. State v. Evans, 120 N.C. App. 752, 463 S.E.2d 830 (1995).

Permanent Disability. — Court did not err in finding as a nonstatutory aggravating factor that the injuries to victims resulted in permanent disability, this factor was not based on the same evidence used to support the aggravating factor that the offense was especially heinous, atrocious, or cruel. State v. Evans, 120 N.C. App. 752, 463 S.E.2d 830 (1995).

III. SENTENCING, GENERALLY.

Trial judge has the discretion to impose either consecutive or concurrent sentences. State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (1996).

Presumptive Sentence Set, etc. —

The Fair Sentencing Act's presumptive sentences set out in former § 15A-1340.4(f) did not apply if a separate statute provided its own presumptive sentence, as § 90-95 does. State v. Willis, 92 N.C. App. 494, 374 S.E.2d 613 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 808 (1989).

Factors Contributing to Service Greater Than Presumptive Term to Be Set Out. — A trial judge is required to consider all of the aggravating and mitigating factors listed in this section before imposing a sentence greater than the presumptive term, but he is only required to set out in the judgment the factors that he determines by the preponderance of the evidence are present. State v. Greime, 97 N.C. App. 409, 388 S.E.2d 594 (1990).

Sentence in Excess of Presumptive Term Upheld. —

Twenty-five-year sentence for robbery with a dangerous weapon held valid, just and in accordance with the purposes of the Fair Sentencing Act. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

The trial court acted under a misapprehension of law when it sentenced a defendant to a presumptive term of three years for marijuana offenses under § 90-95(b)(2). State v. Pavone, 104 N.C. App. 442, 410 S.E.2d 1 (1991).

Habitual Felons. — Defendant's sentences were not excessive where defendant was an habitual offender, sentenced to fourteen years of imprisonment, the minimum sentence allowed under the habitual felon statute. State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

IV. APPELLATE REVIEW.

Consolidation of Presumptive Sentences. — When indictments or convictions with equal presumptive terms were consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms were totaled to arrive at the sentence, the sentence, for purposes of appellate review, because of the provisions of former § 15A-1340.4(a), would be deemed to be equally attributable to each indictment or conviction if nothing else appeared in the record. State v. Hemby, 333 N.C. 331, 426 S.E.2d 77 (1993).

Finding Aggravating Factor for Misdemeanor Conviction Nonprejudicial Error. — The trial court did not need to find an aggravating factor for the breaking and entering count since the defendant was convicted of a misdemeanor which was not subject to former § 15A-1340.4(b). The finding of an aggravating factor for the misdemeanor conviction, therefore, was superfluous and nonprejudicial error. The extent of punishment for misdemeanors is referred to the discretion of the trial court and its sentence may not be interfered with by the appellate court, except in cases of manifest and gross abuse. State v. Clark, 107 N.C. App. 184, 419 S.E.2d 188 (1992).

Where trial judge stated his intended sentence even before evidence was presented to the jury on the issue of guilt, the appellate court could not conclude that the sentence imposed was based solely upon the evidence, the argument of counsel and the aggravating and mitigating factors found by the trial judge, and the case would be remanded for a new sentencing hearing. State v. Cannon, 326 N.C. 37, 387 S.E.2d 450 (1990).

Sentence Influenced by Insistence on Jury Trial. — Where it could reasonably be inferred from the language of the trial judge that sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury was abridged, and a new sentencing hearing would result. State v. Cannon, 326 N.C. 37, 387 S.E.2d 450 (1990).

§ 15A-1340.14. Prior record level for felony sentencing.

(a) Generally. — The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved in accordance with this section.

(b) Points. — Points are assigned as follows:

(1) For each prior felony Class A conviction, 10 points.
(1a) For each prior felony Class B1 conviction, 9 points.
(2) For each prior felony Class B2, C, or D conviction, 6 points.
(3) For each prior felony Class E, F, or G conviction, 4 points.
(4) For each prior felony Class H or I conviction, 2 points.

(5) For each prior Class A1 or Class 1 misdemeanor conviction, 1 point, except that convictions for Class 1 misdemeanor offenses under Chapter 20 of the General Statutes, other than conviction for misdemeanor death by vehicle (G.S. 20-141.4(a2)), shall not be assigned any points for purposes of determining a person's prior record for felony sentencing.

(6) If all the elements of the present offense are included in the prior offense, 1 point.

(7) If the offense was committed while the offender was on probation or parole, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

For purposes of determining prior record points under this subsection, a conviction for a first degree rape or a first degree sexual offense committed prior to the effective date of this subsection shall be treated as a felony Class B1 conviction, and a conviction for any other felony Class B offense committed prior to the effective date of this subsection shall be treated as a felony Class B2 conviction.

(c) Prior Record Levels for Felony Sentencing. — The prior record levels for felony sentencing are:

(1) Level I — 0 points.
(2) Level II — At least 1, but not more than 4 points.
(3) Level III — At least 5, but not more than 8 points.
(4) Level IV — At least 9, but not more than 14 points.
(5) Level V — At least 15, but not more than 18 points.
(6) Level VI — At least 19 points.

In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed.

(d) Multiple Prior Convictions Obtained in One Court Week. — For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

(e) Classification of Prior Convictions From Other Jurisdictions. — Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

(f) Proof of Prior Convictions. — A prior conviction shall be proved by any of the following methods:

(1) Stipulation of the parties.
(2) An original or copy of the court record of the prior conviction.
(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
(4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record. Evidence presented by either party at trial may be utilized to prove prior convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. If a motion is made pursuant to that section during the sentencing stage of the criminal action, the court may grant a continuance of the sentencing hearing. If asked by the defendant in compliance with G.S. 15A-903, the prosecutor shall furnish the defendant's prior criminal record to the defendant within a reasonable time sufficient to allow the defendant to determine if the record available to the prosecutor is accurate. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 22, s. 10; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, ss. 11-13; 1995, c. 507, s. 19.5(f); 1995 (Reg. Sess., 1996), c. 742, s. 15.)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act [October 1, 1994] are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "Prosecution for offenses occurring before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Session Laws 1994 Extra Session, c. 22, s. 10, which amended this section, was effective on the same date that Chapter 538 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after the effective date.

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, added "A1 or class" in subdivision (b)(5).

The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, inserted "Class A1 or" preceding "Class 1 misdemeanor" twice in the last sentence of subsection (e).

§ 15A-1340.15. Multiple convictions.

(a) Consecutive Sentences. — This Article does not prohibit the imposition of consecutive sentences. Unless otherwise specified by the court, all sentences of imprisonment run concurrently with any other sentences of imprisonment.

(b) Consolidation of Sentences. — If an offender is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. The judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense, and its minimum sentence of imprisonment shall be within the ranges specified for that class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

§ 15A-1340.16. Aggravated and mitigated sentences.

(a) Generally, Burden of Proof. — The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(b) When Aggravated or Mitigated Sentence Allowed. — If the court finds that aggravating or mitigating factors exist, it may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If the court finds that aggravating factors are present and are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

(c) Written Findings; When Required. — The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). Findings shall be in writing. The requirement to make findings in order to depart from the presumptive range applies regardless of whether the sentence of imprisonment is activated or suspended.

(d) Aggravating Factors. — The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.

(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(6) The offense was committed against a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.

(7) The offense was especially heinous, atrocious, or cruel.

(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.

(10) The defendant was armed with or used a deadly weapon at the time of the crime.

(11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.

(12) The defendant committed the offense while on pretrial release on another charge.

(13) The defendant involved a person under the age of 16 in the commission of the crime.

(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

(15) The defendant took advantage of a position of trust or confidence to commit the offense.

(16) The offense involved the sale or delivery of a controlled substance to a minor.

(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.

(18) The defendant does not support the defendant's family.
(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.
(19) The serious injury inflicted upon the victim is permanent and debilitating.
(20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 14-2.2 may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial.

(e) Mitigating Factors. — The following are mitigating factors:
(1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
(2) The defendant was a passive participant or played a minor role in the commission of the offense.
(3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
(4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.
(5) The defendant has made substantial or full restitution to the victim.
(6) The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.
(7) The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(8) The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
(9) The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.
(10) The defendant reasonably believed that the defendant's conduct was legal.
(11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
(12) The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.
(13) The defendant is a minor and has reliable supervision available.
(14) The defendant has been honorably discharged from the United States armed services.

(15) The defendant has accepted responsibility for the defendant's criminal conduct.
(16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.
(17) The defendant supports the defendant's family.
(18) The defendant has a support system in the community.
(19) The defendant has a positive employment history or is gainfully employed.
(20) The defendant has a good treatment prognosis, and a workable treatment plan is available.
(21) Any other mitigating factor reasonably related to the purposes of sentences. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 7, s. 6; c. 22, s. 22; c. 24, s. 14(b); 1995, c. 509, s. 13.)

Editor's Note. — A colon following the word "former" in subdivision (d)(6) was deleted at the direction of the Revisor of Statutes.

Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 24 provides: "Prosecutions for, or sentences based on, offenses committed before the effective dates of this Part are not abated or affected by this Part, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this Part remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 7, s. 6, which amended this section, was effective on the date that G.S. 15A-1340.16 became effective (October 1, 1994), and applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 1994, Extra Session, c. 22, s. 22, which amended this section, was effective on the date that s. 56 of Chapter 538 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses committed on or after that date.

The 1995 amendment, effective July 29, 1995, substituted "B1, B2" for "B" in subdivision (d)(18a).

DECIDED UNDER PRIOR LAW

Editor's Note. *— The cases cited below were decided under former §§ 15A-1340.1, 15A-1340.4, and 15A-1380.1.*

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IV. Findings of Court.

I. GENERAL CONSIDERATION.

The Fair Sentencing Act establishes rules which determine what evidence a sentencing judge may consider in aggravating a crime covered by the act; first, a conviction may not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined or by acts which form the gravamen of these convictions; second, evidence used to prove an element of a crime may not also be used to prove a factor in aggravation of that same crime; third, the same item of evidence may not be used to prove more than one factor in aggravation; fourth, acts which could have been, but were not, the basis for other joinable criminal convictions may be used to aggravate the conviction for which defendant is being sentenced; finally, evidence used in proving an element of one crime may also be used to support an aggravating factor of a separate, though joined, crime for which defendant is being sentenced. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

The purpose of sentencing is to punish a criminal with the degree of severity that his culpability merits. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Ordinarily, a resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

Judge Must Consider, etc. —

In accord with second paragraph in the main volume. See State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

If the trial court imposes a sentence greater than the presumptive term for any conviction, it must consider each of the aggravating and mitigating factors under the Fair Sentencing Act for each of defendant's convictions, and make written findings of fact concerning the factors and whether one set of factors outweighs the other. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Findings of Factors of Aggravation and Mitigation Required. — Where the conviction for the sale of cocaine, a Class H felony, has a presumptive term of three years and the trial court imposed a 10-year sentence, findings of factors in aggravation and mitigation were required. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

When Statutory Factor Must Be Found. — Sentencing court is required to find a statutory factor only when the evidence supporting that factor is uncontradicted, substantial, and manifestly credible. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

But this section does not require, etc. —

This section does not limit a trial judge to the aggravating and mitigating factors enumerated herein. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Factors which would mitigate a sentence if present, cannot be used in aggravation if absent. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. State v. Beamer, 339 N.C. 477, 451 S.E.2d 190 (1994).

All circumstances which are transactionally related, etc. — The trial court must consider all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing, provided that they are not essential to the establishment of elements of the offense. This is so regardless of whether such factors were specifically listed under former § 15A-1340.4(a)(1), and regardless of whether the State specifically requests a finding in this regard. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

Separate Factors in Aggravation Cannot Be Found on the Same Evidence. — The trial court improperly found two factors in aggravation based upon the same evidence. Therefore, defendant was entitled to a new sentencing hearing on his convictions for burglary and kidnapping. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Judge Held Not Required to Find Aggravating and Mitigating Factors. — Where defendant was charged, convicted and sentenced for four separate violations of § 14-100,* the trial judge was not required to find aggravating and mitigating factors in sentencing defendant, even though charges against defendant were consolidated for trial and for hearing on judgments, as they were not consolidated for judgment and thus did not exceed maximum ten-year term for the offense. State v. Bresse, 101 N.C. App. 519, 400 S.E.2d 73, cert. denied, 329 N.C. 272, 407 S.E.2d 842 (1991).

II. AGGRAVATING FACTORS.

A. In General.

Sections 15A-1340.3 and former 15A-1340.4 did not require that factors which increased the defendant's culpability be a part of the actions which constituted the crime in order to be aggravating factors. State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991).

Although the same item of evidence may not be used to prove more than one aggravating factor, where detective was killed because he was disrupting the drug trade and because he was going to be involved in the prosecutions of some of the group members, the trial judge's finding of two aggravating factors in former § 15A-1340.4(a)(1)(d) and (a)(1)(e) was not error. State v. Evans, 113 N.C. App. 644, 439 S.E.2d 775 (1994).

This section, by its terms, etc. — In felonious assault case, defendant's contention that the evidence necessary to prove he acted with intent to kill was also necessary to prove premeditation and deliberation was without merit; premeditation means that the defendant formed the intent to kill during some period of time before actually committing the crime; deliberation means that the defendant was in a cool state of blood when he formed the intent to kill; thus, proof of each factor required presenting additional evidence beyond mere intent to kill, and the statutory prohibition against use of evidence necessary to prove an element of the crime to prove a factor in aggravation did not apply. State v. Smith, 92 N.C. App. 500, 374 S.E.2d 617 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Where trial court found as non-statutory aggravating factor the assault on victim was premeditated and deliberated, trial court did not use evidence of an element of the offense to aggravate the same offense for sentencing since proof of premeditation and deliberation requires presentation of additional evidence beyond evidence necessary to prove defendant's intent to kill. State v. Reed, 93 N.C. App. 119, 377 S.E.2d 84, cert. denied, 324 N.C. 580, 381 S.E.2d 779 (1989).

In determining the existence of aggravating factors, the trial court may rely on evidence presented at the sentencing hearing, or, when a defendant pleads guilty, on the circumstances surrounding the offense, including factual allegations contained in the indictment or other criminal process, despite the fact that the State fails to present evidence at sentencing. State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475, cert. denied, 332 N.C. 669, 424 S.E.2d 412 (1992).

Statement of Prosecuting Attorney as Support for Aggravating Factors. — Statement of the prosecuting attorney which, considered with the statement of defendant's attorney, showed that there was a stipulation that the prosecuting attorney could state what the evidence would show, was sufficient to support aggravating factors.

State v. Mullican, 329 N.C. 683, 406 S.E.2d 854 (1991).

The sentencing judge may consider any aggravating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purpose of sentencing, even though not enumerated on the statutory list. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

Presence of Defendant Required. — Trial court erred in adding an aggravating factor outside of defendant's presence, after the sentencing hearing was completed. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

B. Inducing, Leading or Dominating.

When Inducing Others and Leading Others May Constitute Two Aggravating Factors. —

The evidence showed that defendant induced others to participate, and that he lead or dominated others. Since there was separate evidence to support the factors of inducing others to commit a crime and his position of leadership, there was no duplication error. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

The fact that a defendant induced a victim to take part in the offense or exercises leadership or dominance over a victim of a crime was not within the meaning of former § 15A-1340.4(a)(1)a. State v. Mosley, 93 N.C. App. 239, 377 S.E.2d 554 (1989).

Inducing Perjury. — Trial court's finding as an aggravating factor that defendant attempted to induce State's witness to perjure herself upheld. State v. Melvin, 99 N.C. App. 16, 392 S.E.2d 740 (1990).

Finding Upheld. —

Evidence was sufficient to support finding as an aggravating factor that defendant induced others to participate in the trafficking of cocaine. State v. Smallwood, 112 N.C. App. 76, 434 S.E.2d 615 (1993).

D. Victim Performing or Having Exercised Official Duties.

Hindering the Lawful Exercise of a Governmental Function or Law Enforcement. — The trial court erred in finding as a factor in aggravation of sentencing that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws. State v. Whitley, 111 N.C. App. 916, 433 S.E.2d 826 (1993).

Hindrance of Law Enforcement Officer. — In prosecution in which defendant was convicted of assault on officer with a deadly weapon with intent to kill inflicting serious injury and assault on a different law enforcement officer with a firearm, it was not error for the court to find as statutory aggravating factors under former § 15A-1340.4 that: (1) the offense was committed to hinder the lawful exercise of a governmental function or enforcement of the laws, and (2) the offense was committed against a law enforcement officer in the performance of his official duties. State v. Price, 118 N.C. App. 212, 454 S.E.2d 820 (1995).

E. Heinous, Atrocious or Cruel.

Focus Is on Brutality, etc. —

In accord with the main volume. See State v. Torres, 322 N.C. 440, 368 S.E.2d 609 (1988); State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

Relationship Held Not to Support Factor. — Trial court erred in finding that defendant's conduct was heinous in that victim was the mother of defendant's nephew. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Reference to "Overall Situation" Did Not Amount to Improper Consideration. — Trial court did not err in finding as an aggravating factor in both cases of assault with a deadly weapon with intent to inflict serious injury that offense was especially heinous, atrocious or cruel; trial court's reference to "overall situation" did not necessarily indicate the judge was improperly considering a "course of conduct" that included commission of a joined offense. State v. Reed, 93 N.C. App. 119, 377 S.E.2d 84, cert. denied, 324 N.C. 580, 381 S.E.2d 779 (1989).

Armed Robbery. — While any armed robbery is frightening to the victim and repugnant to lawful society, the aggravating factor set forth in former § 15A-1340.4(a)(1)(f) expressly applied only to especially heinous, atrocious, or cruel offenses. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Sufficient Evidence to Support Factor. —

Defendants held victim helpless in the presence of the beating being administered to victim's husband by co-defendant. The kind of suffering, both physical and psychological, that victim endured at the hands of defendant concomitantly with burglary is not ordinarily present when a burglary is committed. Thus, record evidence supports the court's finding of heinous, atrocious or cruel behavior during commission of the burglary. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Where the evidence showed that a homicide involved a violent struggle in which the victim's scalp was torn away from her skull; her torso, head and face were severely bruised from the blows she received; she lost a tremendous amount of blood; her body and the floor around her body were covered with blood, and blood was splattered on the walls of the room; her lungs and trachea were full of blood, and she was beaten and stabbed so many times it is not entirely clear whether a blow or the knife wound was the actual cause of death, multiple injuries such as those found here may demonstrate that a crime was committed in an especially heinous, atrocious or cruel manner. State v. Smart, 99 N.C. App. 730, 394 S.E.2d 475 (1990), cert. denied, 328 N.C. 576, 403 S.E.2d 520 (1991).

Evidence Not Sufficient — Second-Degree Murder. —

Where the peculiar facts of a case gave no evidence that the murder was excessively brutal or dehumanizing when compared to other second-degree murders, the single fact that the defendant inflicted multiple wounds did not make the second-degree murder especially heinous, atrocious, or cruel under former § 15A-1340.4(a)(1)f. State v. Torres, 322 N.C. 440, 368 S.E.2d 609 (1988).

Where defendant struck the victim on the head only two or possibly three times with a stick after the victim had fallen and where testimony of the witness nearest the victim indicated that the victim was rendered unconscious immediately, the attack was not excessively more brutal than any other second-degree murder; therefore, the trial court erred when it found that the murder was especially heinous, atrocious or cruel. State v. Stanley, 110 N.C. App. 87, 429 S.E.2d 349 (1993).

Evidence Held Not Sufficient — Armed Robbery. — Where the State presented no evidence to show that defendant's actions in the robbery were more excessively brutal than those of other armed robbers or that the victim endured more psychological or physical pain or dehumanizing aspects than other armed robbery victims, aggravation of sentence was improper. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Evidence Held Sufficient — Burglary. — The evidence was sufficient to support aggravating factor that burglary of victims' home was especially heinous, atrocious or cruel where the acts in question constituted neither another crime nor the gravamen of another crime for which defendant was convicted and they were not used as evidence to prove any other aggravating circumstancen. With regard to the burglary itself, the state was required to prove that defendant entered the dwelling; but the egregious manner in which the entry occurred and defendant's being armed with a firearm were superfluous to the entry itself. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

F. Risk of Death to More Than One Person.

To impose this aggravating factor, the sentencing judge must focus on two considerations: (1) whether the weapon in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was knowingly created. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

What Weapons Are Contemplated by This Factor. — The legislature intended this aggravating factor to be limited to those weapons or devices which are indiscriminate in their hazardous power. Automatic weapons such as machine guns or bombs would fit that description. These weapons are normally hazardous to the lives of more than one person. A rifle, while it may sometimes be dangerous to the lives of more than one person, is not so normally. State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984); State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 9 (1987).

Weapon Must Be Indiscriminate. — To qualify as a weapon or device which in its normal use is hazardous to the lives of more than one person, the instrumentality must be one which is indiscriminate in its hazardous power. State

v. McBridge, 118 N.C. App. 316, 454 S.E.2d 840 (1995).

A shotgun is a weapon which would normally be hazardous to more than one person if it is fired into a group of two or more persons in close proximity to one another. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Automobile. — Where defendant operated his automobile while legally intoxicated, his blood alcohol concentration being .183 grams of alcohol per 100 milliliters of blood, and drove his automobile recklessly, crossing over into the oncoming lane of traffic and striking an automobile containing three passengers, killing or seriously injuring them, the trial court did not err in finding that defendant's automobile, under the circumstances surrounding its use, constituted a device which in its normal use was hazardous to the lives of more than one person, and that defendant knowingly created great risk of death thereby. State v. McBridge, 118 N.C. App. 316, 454 S.E.2d 840 (1995).

Second-Degree Murder. — Where the record showed that three persons were sitting close to each other on the same couch when defendant fired shotgun from a distance of less than 12 feet away, the record contained sufficient evidence to support the sentencing judge's finding of this aggravating factor on second-degree murder conviction. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

G. Deadly Weapon.

Defendant Need Only Be Armed with Deadly Weapon. — As former § 15A-1340.4(a)(1)i made clear, this aggravating factor could be found if a defendant either used a deadly weapon or was merely armed with one at the time of the crime. State v. Rios, 322 N.C. 596, 369 S.E.2d 576 (1988).

Co-Defendant's Use of Gun. — By being present at the scene of the crime, with the intent to see it take place, and by performing the overt act of assisting in its commission by driving the getaway car, defendant became a principal in the crime, and his co-defendant's use of the gun in perpetrating the crime was therefore imputed to defendant; there is no indication that the legislature in its enactment of this section, sought to change this well-established rule with respect to the statutory aggravating factor of using a deadly weapon by adding scienter as an element to be found by the court; therefore, the question of defendant's awareness of the gun was not dispositive. State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989).

And Where Use of Deadly Weapon Is Essential Element of Offense. — The trial court erred in relying upon the aggravating factor of defendant's use of a deadly weapon in sentencing defendant for assault with a deadly weapon with intent to kill and discharging a firearm into occupied property, as an essential element of both offenses involves the use of a deadly weapon. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

Common-Law Robbery. — Use of a deadly weapon has never been an element of proof required to establish common-law robbery in North Carolina; consequently, the State's evidence proving defendant's use of the gun as an aggravating factor was not barred by former § 15A-1340.4(a). State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989).

H. Young, Old, or Infirm Victim.

State has the burden of showing (1) that the victim was in fact vulnerable because of conditions at the time of the offense, and (2) that she was targeted because of these conditions or that the defendant took advantage of them while committing the offense. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

But Victim Need Not Be Targeted Because of Age or Infirmity. — When considering the age of a child kidnapping victim as an aggravating factor, it is not necessary to show that the abduction was caused by the child's vulnerability. It is not the cause of the taking which supports the aggravating factor. Whatever the motive, if the victim is more vulnerable because of age, this aggravates the crime. State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991).

Victim Need Not Be Present During Commission of Crime. — The policy underlying this aggravating factor is to deter criminals from taking advantage of a victim's age or mental or physical infirmity and the presence of victim during the commission of the crime is irrelevant. State v. Rios, 322 N.C. 596, 369 S.E.2d 576 (1988).

Victim's old age was improperly found as an aggravating factor for the crime of first-degree burglary since there was no evidence tending to show victim's home was targeted for burglary because of her old age, as there was no evidence at all that defendant knew the age of the occupants of the house before he broke into it, and since there was no evidence in the record that victim, because of her old age, was more vulnerable to having her home burglarized than anyone else, or that she had a more difficult time recovering from the effects of the crime. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Child Victim with Low I.Q. — Trial judge's finding as an aggravating factor that 12-year-old victim of sexual assault was especially vulnerable in that she had an I.Q. in the mildly handicapped range (45-60) and that her development age was six years and two months upheld. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

Victim's Intoxication Considered an Infirmity. — The trial court was correct in finding as an aggravating factor that the victim was physically infirm in that he was acutely intoxicated. State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992).

Sleeping Victim. — Trial court properly aggravated defendant's sentence for rape where victim was asleep and was therefore impeded from fleeing or fending off the attack. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Presence of Child During Rape of Mother. — Trial court properly found as an aggravating factor the fact that victim's two young children were present in the house at the time of rape. Particularly compelling was the fact that victim's 15-month-old baby was in the room with defendant and victim during the attack. Because the victim feared for the safety of her baby, she clearly was inhibited in her ability to resist attack and protect herself. Under these circumstances, she was rendered more vulnerable to an attack. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Menstrual Cycle. — Court erred by aggravating defendant's sentence on grounds that rape victim was having her period, where there was no evidence in the record that the fact that the victim was menstruating at the time of attack rendered her "physically infirm" or more vulnerable and less able to protect herself from her attacker, and no evidence that the defendant targeted or took advantage of her because she was having her period. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Absence of Rape Victim's Husband. — Trial court properly aggravated defendant's sentence based upon a finding that defendant knew that victim's husband was away on military duty and that he proceeded to target her because of this knowledge. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Finding Upheld. —

Where 70-year-old victim's physical infirmity was not the sole evidence supporting the two aggravating factors of victim's old age and physical infirmity, as there was discrete evidence that victim lived alone in an apartment building for the elderly, and that defendant knew victim and was able to assess her vulnerability, finding of these factors did not violate § 15A-1340.4(a). State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Where evidence showed that 74-year-old victim's advanced age caused her to be more vulnerable to defendant's restraint and removal of her from her home than most women of a younger age as evidenced by her failed escape attempt, consideration of victim's age as an aggravating factor in second-degree kidnapping conviction was appropriate. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

I. Commission of Crime While on Pretrial Release.

Lack of Speed for Trial of Earlier Felony Charge Was Irrelevant to Factor. — Trial court did not err by finding, in aggravation of burglary sentence, that defendant committed burglary while on pretrial release from another felony charge even though earlier felony charge was left dormant by prosecutor for one and one-half years; speed or lack thereof with which first case is tried is irrelevant to factor's validity, although weight to be given such factor is for judge's discretion. State v. Parks, 324 N.C. 94, 376 S.E.2d 4 (1989).

Commission of Offense While on Release for Misdemeanor. — Fact that defendant committed an offense while on release for a misdemeanor, rather than a felony, does not preclude the court from finding it as an aggravating factor. It simply means that the court is not required to find it as an aggravating factor. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Finding as an aggravating factor that defendant committed an offense while on release for a misdemeanor, rather than a felony, would not be contrary to the intent of the legislature as expressed by former § 15A-1340.4(o), which required that the sentencing court consider as an aggravating factor the fact that defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement, when such factor was proven by the evidence. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

J. Person under 16 Involved in Commission of Crime.

Application of Factor. — The fact that the victim of a particular crime falls below the age of 16 was not included within the meanings of former § 15A-1340.4(a)(1)*l*. State v. Mosley, 93 N.C. App. 239, 377 S.E.2d 554 (1989).

The aggravating factor that defendant involved a person under the age of 16 in a crime was not properly found based on the evidence that a child under 16 was present with the victim and defendant when the victim performed oral sex on defendant. State v. Mosley, 93 N.C. App. 239, 377 S.E.2d 554 (1989).

Evidence held sufficient to support a finding as a factor in aggravation when sentencing defendant on the noncapital felonies of conspiracy to commit murder and conspiracy to commit arson that defendant involved a person under the age of 16 in the commission of the crime. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

K. Great Monetary Value or Loss.

Editor's Note. — *On p. 575 of the main volume, the correct citation for the case note under the heading* ***"Monetary Loss Must Be Loss from Property Damage"*** *is State v. Sowell, 318 N.C. 640, 350 S.E.2d 363 (1986).*

L. Position of Trust.

Husband-Wife Relationship. — Husband-wife relationship permits a finding of this factor. State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991).

Parent-Child Relationship Not Factor When Manslaughter Based on Misdemeanor Child Abuse or Criminally Negligent Act. — The aggravating factor that the defendant took advantage of a position of trust or confidence can not be used to increase a sentence beyond the presumptive for involuntary manslaughter when the manslaughter conviction could have been based on the predicate crime of misdemeanor child abuse, which has as an element that the defendant was a parent of the victim, or by a finding that defendant committed a criminally negligent act, and the jury was instructed as to both possibilities. State v. Darby, 102 N.C. App. 297, 401 S.E.2d 791 (1991).

Customer of Cocaine Dealer. — The defendant was not put in the type of position of trust or confidence envisioned by legislature in establishing the aggravating factor set forth in this section, even though defendant had been to victim's home on numerous occasions and was one of his regular cocaine customers. State v. Erlewine, 328 N.C. 626, 403 S.E.2d 280 (1991).

Insufficient Evidence to Support Finding of Factor. — Where the only relationship between victim and defendant was that defendant and victim had worked at the same place of employment and that defendant had driven a van that victim had been in at least five times, the evidence showed only that the victim was acquainted with defendant and the relationship between the victim and defendant did not rise to a relationship of trust that caused the victim to rely upon defendant. State v. Hammond, 118 N.C. App. 257, 454 S.E.2d 709 (1995).

M. Prior Convictions.

1. In General.

Purposes of Sentencing. — To say that an offense which is punishable by more than 60 days confinement should not be used as an aggravating factor because it is not related to the purposes of sentencing for the crime charged would be substituting the judgment of the Supreme Court for the judgment of the legislature. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

"Prior Conviction" Defined. — This section contains no language to support the argument that the legislature intended to define "prior conviction" as a conviction obtained before a later offense was committed; a fair reading of the statute defines "prior conviction" as one that is obtained before the defendant is sentenced for another offense. State v. McCullers, 77 N.C. App. 433, 335 S.E.2d 348 (1985).

More Than Sixty Days' Confinement. — The legislature has determined that conviction of any criminal offense punishable by more than 60 days' confinement is an aggravating factor. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

Use of Fact Needed to Prove Contemporaneous Conviction. —

A conviction of driving while impaired under § 20-138.1, irrespective of the level of punishment imposed, constitutes a prior conviction of an offense punishable by more than 60 days' imprisonment for purposes of sentencing under the Fair Sentencing Act. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

Finding of Prior Conviction as Factor Upheld. —

Trial court did not err in utilizing defendant's prior drug offenses as aggravating factors for his then current convictions for indecent liberties. State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990).

Prior conviction of a level four driving while impaired offense which carries a possible sentence of up to 120 days in prison met the standard set out in this section to find such conviction an aggravating factor in sentencing for a second-degree murder conviction. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

The trial court did not err in denying second-degree murder defendant's motion to suppress evidence of three prior convictions, later relied upon by the court as aggravating factors to support sentencing defendant to a term greater than the presumptive. State v. Hester, 111 N.C. App. 110, 432 S.E.2d 171 (1993).

2. Evidence.

The means of proof set out in § 15A-1340.4(e) are permissive, not mandatory, etc. —

In accord with the main volume. See State v. Wooten, 104 N.C. App. 125, 408 S.E.2d 202 (1991).

Other Methods of Proof Are Not Precluded, etc. —

In accord with first paragraph in the main volume. See State v. Stone, 104 N.C. App. 448, 409 S.E.2d 719 (1991).

Former section 15A-1340.4 did not preclude other methods of proof. State v. Duffy, 109 N.C. App. 595, 428 S.E.2d 695 (1993).

The State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to impeach the defendant or to aggravate his sentence. State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992).

A prior conviction may be proven by defendant's admission. State v. Wooten, 104 N.C. App. 125, 408 S.E.2d 202 (1991).

Party Admission Held Sufficient to Support Findings of Aggravating Factor. — Party admission, contained in defendant's motion in limine, of his previous conviction in California, was sufficient evidence to support the trial court's finding of aggravating factor. State v. Duffy, 109 N.C. App. 595, 428 S.E.2d 695 (1993).

Evidence of Prior Convictions Used as Proof as Element of Crime. — As a basis for imposing a life sentence for the offense of second-degree murder (in a drunk driving fatality case), the trial court found one aggravating factor, prior convictions for criminal offenses punishable by more that 60 days confinement, and no mitigating factors. The State had relied on the prior convictions in its case as proof of malice, and evidence offered at trial to prove malice, an element of second degree murder, cannot be the basis for aggravating that crime. Because defendant's prior convictions were offered by the State as proof of malice, the trial court's consideration of such convictions as a factor in aggravation was error. State v. McBride, 109 N.C. App. 64, 425 S.E.2d 731 (1993).

As Can Defense Counsel's Statement. — A defense counsel's response to the prosecutor's assertion of a prior conviction can in certain cases constitute a stipulation or an admission that the defendant indeed has the convictions represented by the State. State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992).

The prosecutor's unsworn statements, etc. —

Trial court erred in finding existence of prior conviction based solely on prosecutor's unsworn statement where although prosecutor read from official records he neither offered those records into evidence nor sought defendant's stipulation as to what those records would show. State v. Williams, 92 N.C. App. 752, 376 S.E.2d 21, cert. denied, 324 N.C. 251, 377 S.E.2d 762 (1989).

Where a trial judge based his finding of an aggravating factor of prior convictions solely on a prosecutor's unsworn statements, these statements, standing alone, were insufficient to prove defendant's prior convictions under this section. The defendant's failure to object at trial did not bar her from appealing this issue. State v. Gordon, 104 N.C. App. 455, 410 S.E.2d 4, cert. denied, 330 N.C. 444, 412 S.E.2d 78 (1991).

Proof of a prior conviction by a certified copy is expressly permitted by statute and constitutes prima facie evidence of the facts set out therein. State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

Certified copies of court records are a proper method for proving prior convictions. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

Evidence of a kidnapping defendant's prior crimes was properly used to establish the status of a habitual felon as well as to establish the aggravating factor of prior felony convictions to increase the presumptive sentence of the underlying felony. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Prior Conviction Proven. — The contents of the certified court record of defendant's Virginia conviction for sodomy, along with defendant's admission on cross-examination that "the Judge imposed a judgment ... as a result of that guilty plea," constituted sufficient evidence to refute defendant's argument that no judgment was entered on the Virginia felony conviction. State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

N. Nonstatutory Factors.

The State has the burden of proving the existence of a nonstatutory aggravating factor by a preponderance of the evidence. The State must also show that it is reasonably related to the purposes of sentencing. State v. Hargrove, 104 N.C. App. 194, 408 S.E.2d 757, cert. denied, 330 N.C. 444, 412 S.E.2d 79 (1991).

Reasonably Related to Purpose of Sentencing. — Pursuant to this section, a sentencing judge may consider any nonstatutory aggravating factor which is reasonably related to the purposes of sentencing and is proven by the preponderance of the evidence. State v. Thompson, 328 N.C. 477, 402 S.E.2d 386 (1991).

Exercising the right against self-incrimination cannot be an aggravating factor in the defendant's sentence. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

Failure to Perform a Mitigating Act Is Not an Aggravating Factor. — It is improper to aggravate a defendant's sentence for his failure to perform an act when the doing of the act would support the finding of a factor in mitigation. State v. Coleman, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

Omission of an Act. — The trial judge, in proper circumstances, should not be precluded from finding the omission of an act to be an aggravating factor when in other circumstances the performance of that act might be a nonstatutory mitigating factor. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Premeditation and Deliberation in Aggravation of Violent Offense. — It is well established that premeditation and deliberation may properly be found as a factor in aggravation of a violent offense. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Premeditation and Deliberation in Voluntary Manslaughter Case. — Premeditation and deliberation are appropriate nonstatutory aggravating factors where the defendant pleads guilty to voluntary manslaughter. State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

Finding of Premeditation and Deliberation in Felonious Assault Case. — Where the evidence showed that there was considerable ill will between the parties in the weeks preceding felonious assault, which ill will culminated in violence on at least two occasions prior to felonious assault; that one week before felonious assault, defendant showed his wife butterfly knife, which was type of knife used in assault, and told her drug dealers were after him and were going to get her to get at him; and that, hours before assault, defendant approached wife at concert and told her she was dead, or was going to die, or words of similar import, the State met its burden of proving premeditation by a preponderance of the evidence. State v. Whitaker, 100 N.C. App. 578, 397 S.E.2d 372 (1990).

Child in Hospital at Time of Abduction. — That a child victim of kidnapping was more vulnerable because he was in a hospital at the time of his abduction was a proper non-statutory aggravating factor. It was particularly egregious that defendant disguised herself as a nurse and used this disguise to abduct the baby. The mother of the child had a right to rely on a person dressed as a nurse. This made the victim more vulnerable than he ordinarily would have been and makes it a worse crime than if it had occurred under other circumstances. State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991).

Pattern of Conduct Causing Serious Danger to Society. —

Evidence showing that defendant and

his companions first went to the victim's home and when victim refused to open the door, the three men left and went to a nightclub, that while at the nightclub, they consumed quantities of liquor and got into a fight with several other people, that during the course of the evening they armed themselves with a sawed-off shotgun, and that armed and intoxicated, they returned a second time to the victim's home, all unrelated to the other crimes for which defendant was convicted, was enough to support the trial court's finding in aggravation that defendant engaged in a pattern of conduct causing serious danger to society. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

Defendants consumed quantities of liquor and got into a fight with several other people; armed themselves with a sawed-off shotgun; and armed and intoxicated, went to victim's home. This evidence, all unrelated to the other crimes for which defendant was convicted, is enough to support the trial court's finding of aggravation that defendant engaged in a pattern of conduct causing serious danger to society. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Consideration of Element of Greater Charge Dropped in Exchange for Plea Bargain. — Judge's finding as an aggravating factor that there was vaginal penetration by defendant was not error where defendant pled guilty to attempted first degree sexual offense and attempted indecent liberties with a child, as it is not a violation of defendant's constitutional due process rights to consider as an aggravating factor an element of a greater charge dropped in exchange for a plea bargain for a lesser included offense where the dismissed charge is not used in aggravation. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

Medical Expenses of Victim. —

While medical expenses, which represent a financial burden on the victim, may be considered as a non-statutory factor in aggravation under this section, they may not be so used unless they are excessive and go beyond that normally incurred from an assault of this type. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Where evidence concerning the victim's medical bills and his lack of insurance was placed before the court solely by the oral representation of the prosecuting attorney, no bills or records or other evidence was submitted, and the victim did not testify nor did the defendant stipulate to the amounts or existence of the medical bills, the State presented insufficient evidence to support the non-statutory aggravating factor that the injury caused great monetary damage to the victim. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Financial Burden Imposed Upon Victim. — There are circumstances under which the financial burden imposed upon the victim by his injury may be used as a non-statutory aggravating factor under § 15A-1340.4(a)(1)m. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Failure to Aid Victim. —

Where defendant failed to render aid to the helpless 17-month-old child who was in defendant's custody and care for three days, during which time the child was suffering from painful second-degree burns, such conduct increased the injury to the child and clearly increased defendant's culpability. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Failure to Provide Medical Assistance. — Failure to provide child abuse victim with medical treatment at a reasonable time after his injury may be considered as a factor in aggravation. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Failure to Aid in Law Enforcement. —

Trial court improperly found as a nonstatutory aggravating factor that the defendant gave no substantial assistance to law enforcement. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

Denial of Guilt. — Trial judge improperly considered defendant's denial of all guilt in regard to the charges as an aggravating factor in sentencing. State v. Harrell, 100 N.C. App. 450, 397 S.E.2d 84 (1990).

Imposition by the trial court of maximum sentence on defendant because defendant denied guilt was error entitling defendant to a new sentencing hearing. State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991).

Premeditation and Deliberation, etc. —

Forty-year sentence imposed on defendant who pled guilty to second-degree murder, based in part on the finding as a nonstatutory factor in aggravation that the killing had been planned for two months and was premeditated, would be upheld. State v. Jackson, 91 N.C. App.

124, 370 S.E.2d 687 (1988).

Where a defendant is convicted on an indictment charging only second degree murder, a determination by a preponderance of the evidence that defendant premeditated and deliberated the killing is reasonably related to the purposes of sentencing. Therefore, a sentencing judge is not barred from using premeditation and deliberation as an aggravating factor in such a case. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

Finding of Premeditation and Deliberation in Felonious Assault Case. — Where evidence presented tended to show defendant acquired personal information about his victim, adopted an alias, contacted him to schedule a meeting about his girlfriend in order to observe what the victim looked like, and several weeks later on the night of the offense, awaited the victim's return home, spoke his name when the latter passed by, and then fired four shots at him as he tried to escape, the circumstances of this felonious assault supported the trial court's finding of premeditation and deliberation, and tended to show a higher degree of culpability than other assault cases; therefore, the use of nonstatutory factors to aggravate defendant's sentence were proper. State v. Smith, 92 N.C. App. 500, 374 S.E.2d 617 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

Discharge of Firearm into Occupied Property. — In sentencing for discharging a firearm into occupied property, that defendant shot at least two times into the house could properly be used as a basis for aggravation. The crime of discharging a weapon into an occupied building is accomplished when the defendant shoots once into the structure, and any further acts of shooting are above and beyond that necessary to prove the offense for which defendant is convicted. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

In sentencing for discharging a firearm into an occupied building, finding that the shooting endangered a two year old child could be considered as an additional nonstatutory aggravating factor. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Desertion from U.S. Army. — Where defendant in child abuse prosecution admitted that he was AWOL from the U.S. Army and the evidence showed that this fact dictated his family's secretive life style and was directly related to defendant's child care responsibilities and opportunity for abuse of the child, defendant's desertion increased his culpability, and the trial court did not err in finding this factor in aggravation. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Lack of Remorse. —

The only evidence recorded in support of the court's finding that defendant was unremorseful was that during the sentencing proceeding defendant laughed while the prosecutor was reading statements elicited by the police, and the evidence was contradicted by defendant's testimony as to how the sexual encounter started and by his statement that he laughed because the statements read were mostly lies; while this evidence warranted the reprimand that the court administered, the evidence did not support the court's conclusion that the defendant was without remorse. State v. Parker, 92 N.C. App. 102, 373 S.E.2d 558 (1988), cert. denied, 324 N.C. 250, 377 S.E.2d 760 (1989).

While an expression of remorse might have mitigated defendant's sentence, the lack of such an expression, which took the form of exercising his right against self-incrimination, could not be an aggravating factor in defendant's sentence. State v. Williams, 98 N.C. App. 68, 389 S.E.2d 830 (1990).

When a defendant has pled not guilty and maintains his plea, finding as nonstatutory aggravating factor that he has not exhibited any remorse and imposing a sentence beyond the presumptive term is error warranting a new sentencing hearing. State v. Williams, 98 N.C. App. 68, 389 S.E.2d 830 (1990).

Pecuniary Gain as Nonstatutory Aggravating Factor. — The statute does not prohibit the use of pecuniary gain as a nonstatutory aggravating factor. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

In cases where defendant is not hired or paid to commit the offense, there is nothing to prevent the use of pecuniary gain as a nonstatutory aggravating factor, provided pecuniary gain is not an element essential to the establishment of the crime which is sought to be aggravated. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

Where defendant pleaded guilty to possession of stolen property, and she received this property as the result of a crime in which she participated and in which the victim received serious injuries, this increased her culpability. State

v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991).

Fact that murder was committed for pecuniary gain may be used as a nonstatutory aggravating factor in the absence of any evidence that defendant was hired or paid to commit the offense. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

A person who conspires and solicits the taking of a person's life, so that he may live off the insurance proceeds from that person's death and live in that person's home is more culpable by reason of those motives, and a sentence greater than the presumptive is warranted for purposes of deterrence as well as protection of the unsuspecting public. State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990).

Peace of Mind and Body. — Although the trial court did not formally find as a nonstatutory aggravating factor that victim, like any other citizen, is entitled to peace of mind and body in her home, the court's comments indicate that it nevertheless improperly considered it in determining defendant's sentence. State v. Shaw, 106 N.C. App. 433, 417 S.E.2d 262, cert. denied, 333 N.C. 170, 424 S.E.2d 914 (1992).

Retaliation by Codefendant. — Finding as an aggravated factor against defendant that his codefendant was motivated to retaliate against victim for seeking child support held error. State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

O. Elements of Offense.

Circumstances that are inherent in the crime of which defendant is convicted may not be used as aggravating factors, etc. —

Because the jury found the defendant not guilty of first degree rape but guilty only of second degree rape, the jury clearly rejected the theory that the defendant employed a deadly weapon in commission of the crime. Where defendant was in effect found innocent by the jury of an element of a crime with which he was charged, in this case the use of a deadly weapon, the court cannot then find such as a factor in aggravation. State v. Ward, 104 N.C. App. 550, 410 S.E.2d 210 (1991).

The trial court erred in finding as an aggravating factor that "the defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person" because evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. State v. Antoine, 117 N.C. App. 549, 451 S.E.2d 368 (1995), cert. denied, 340 N.C. 115, 456 S.E.2d 320 (1995).

Duplication of Proof Did Not Prohibit Finding of Factor. — It did not matter that certain evidence essential to establish the giving of aid or advice by defendant convicted of being an accessory before the fact also tended to show he persuaded the principal to commit the offense in question. Such duplication in proof did not prohibit the trial judge from using the evidence to find a factor in aggravation. State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, appeal dismissed, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

Where evidence of vaginal penetration was not necessary to prove the offense defendant pled guilty to and was sentenced for, namely, taking indecent liberties with a child, the finding that his conduct indicated that he was guilty of the greater offense charged was not forbidden by former § 15A-1340.4(a)(1). State v. Parker, 92 N.C. App. 102, 373 S.E.2d 558 (1988), cert. denied, 324 N.C. 250, 377 S.E.2d 760 (1989).

P. Joinable Offenses.

Editor's Note. *— The annotations to State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984) and State v. McGuire, 78 N.C. App. 285, 337 S.E.2d 620 (1985), which appear under analysis item II. P., beneath the catchline* ***"Nor May Joinable Offense Not Charged Be Used"*** *in the main volume, should now be read in light of State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991).*

Evidence of Element of Joined Offense. —

Court may not use the commission of a joinable offense as an aggravating factor. However, the court may use evidence necessary to prove an element of a joinable offense as an aggravating factor. State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990).

Convictions for Joinable Offenses May Not Be Considered. —

A sentencing judge may not use a joined or joinable offense in aggravation. State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988).

A conviction for which defendant is being sentenced may not be aggravated by defendant's acts which form the gravamen of contemporaneous convictions of joined offenses. However, evidence of acts unrelated to the joined convictions may properly be considered. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

When Evidence of Murder May be Aggravating Factor for Armed Robbery. — It is clear that evidence presented to support a conviction of first-degree murder by premeditation and deliberation could also support an aggravating factor in an armed robbery conviction. However, a premeditated and deliberate murder that occurred during an armed robbery may not be used as an aggravating factor in the armed robbery sentencing here if the murder is a joined offense. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Offense Held Joinable. — The trial court did not err by aggravating defendant's sentence on the first-degree burglary conviction with the fact that defendant was armed with a deadly weapon at the time he committed the initial crime of burglary. State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993).

A Joinable Offense for Which Defendant Not Convicted May Be Used. — Former section 15A-1340.4(a)(1)o, as interpreted in *State v. Lattimore, 310 N.C. 295, 311 S.E.2d 876 (1984),* only prohibited a sentencing judge from aggravating a sentence on the basis that defendant committed an act when that act constituted a joinable offense for which he had also been convicted. *Lattimore* did not prohibit a trial court from using as an aggravating circumstance evidence that defendant committed an act for which he was not convicted. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991). Declining to follow State v. McGuire, 78 N.C. App. 285, 337 S.E.2d 620 (1985), and further distinguishing State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

When a defendant pleads guilty to being an accessory after the fact of a crime, should the trial court find by a preponderance of the evidence that the defendant aided and abetted in the commission of that crime, it may use this factor in aggravation of defendant's sentence on the accessory charge. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

Q. Preventing Arrest or Effecting Escape.

Scope of § 15A-1340.4(a)(1)b. — The language in former § 15A-1340.4(a)(1)b, like that in § 15A-2000(e)(4), was intended to include situations in which defendant's motivation in committing the second offense was to avoid subsequent detection and apprehension for the underlying crime; it was not to be limited solely to situations where defendant committed the second offense in an effort to avoid an immediate arrest or to escape from custody. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

Assault Committed for Purpose of Avoiding Detection and Apprehension. — Where one of defendant's purposes behind the sexual assault of his grandmother was the desire to avoid detection and apprehension for his prior assault upon her, which resulted in her death, defendant's actions were properly submitted to the jury as an aggravating factor in his sentencing hearing. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

III. MITIGATING FACTORS.

A. In General.

The defendant has the burden, etc. — In accord with the first paragraph in the main volume. See State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

The sentencing judge is required to find in mitigation any factor proved, etc. — Before it imposes a sentence exceeding the presumptive term, the sentencing court must consider all statutory mitigating factors that are supported by the evidence; furthermore, the sentencing court is obligated to find a statutory mitigating factor when the evidence supporting that factor is uncontradicted and manifestly credible. State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992).

But Evidence Must Show Conclusively, etc. — In accord with main volume. See State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992).

Only if the evidence offered at the sentencing hearing so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn is the court compelled to find that a mitigating factor exists. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

And Court May Determine What Weight a Mitigatory Factor Will Be Given. — The trial court was required to find a statutory mitigating factor under the Fair Sentencing Act only if the evidence supporting that factor was uncontradicted and there was no reason to doubt its credibility; even then, the trial court was free to determine what weight it would give such a mitigating factor in sentencing under former § 15A-1340.4(a). State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992), cert. denied, 507 U.S. 1055, 113 S. Ct. 1955, 123 L. Ed. 2d 659 (1993), cert. denied, 507 U.S. 1055, 113 S. Ct. 1955, 123 L. Ed. 2d 659 (1993).

The sentencing court is accorded wide latitude in determining the existence of mitigating factors, for it observes the demeanor of the witnesses and hears the testimony. State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992).

Reasonable Belief Conduct Was Legal. — Trial court's failure to find mitigating factor was not reversible error where only evidence to support finding that defendant reasonably believed that his conduct was legal was defendant's own testimony to effect that he thought he could settle matter in manner of a civil action; although there was no evidence directly contradicting testimony, evidence showed that defendant never raised issue of settlement in present of authorities but only discussed it with victim over telephone and when requesting payment, defendant made clear to victim that matter could not be settled after defendant signed arrest warrants; thus indicating that he knew that a criminal prosecution could not be settled. State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989).

B. Duress, Coercion, Threat or Compulsion.

Duress Not Found. —

Trial court was correct in refusing to find mitigating factors based on duress or provocation; victim never directly threatened defendant, and although there was some evidence that victim was attempting to arrange an assault, victim himself contradicted this, and there was no manifestly credible evidence that defendant was the target. State v. Lovell, 93 N.C. App. 726, 379 S.E.2d 101 (1989).

C. Passive or Minor Role.

Evidence did not so clearly establish, etc. —

Where defendant did not object to the actions of codefendants in sexually assaulting 12-year-old, did not attempt to persuade them to stop, and, in fact, attempted to have sex with the victim at one codefendant's encouragement, trial judge's refusal to find that the defendant was a passive participant was not error. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

D. Mental or Physical Condition.

Evidence of Condition, Without More, etc. —

Where there was no medical evidence regarding the state of defendant's mental and physical health other than testimony as to defendant's condition during the trial, and assuming arguendo there was sufficient evidence to show that defendant was suffering from a particular physical or mental condition, there was no evidence that the condition was such as to reduce his culpability in assaulting his brother, the judge did not abuse his discretion in failing to find a mitigating factor. State v. Kinney, 92 N.C. App. 671, 375 S.E.2d 692 (1989).

Proffered evidence of diminished capacity due to intoxication did not compel a finding of the statutory mitigating factor that defendant was suffering from a physical condition which was insufficient to constitute a defense, but which significantly reduced his culpability, because it failed to demonstrate that defendant's alcohol consumption reduced his mental or physical capacity, and thus his culpability to commit the offense. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990), cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Factor Not Found. —

Where a defendant failed to establish by a preponderance of the evidence that his alcohol and drug consumption constituted a material impairment to his mental or physical faculties, the trial judge did not err in failing to find the statutory mitigating factor that the defendant was suffering from a mental or physical condition which significantly reduced his culpability for the offense. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

E. Immaturity or Limited Mental Capacity.

The mitigating factor in § 15A-1340.4(a)(2)e involves two inquiries, etc. —

The mitigating factor of the defendant's immaturity or limited mental capacity, requires a bipartite showing. The defendant must show not only his immaturity or limited mental capacity, but also that his immaturity or limited mental capacity significantly reduced his culpability. State v. Barton, 335 N.C. 741, 441 S.E.2d 306 (1994).

Defendant Bears Burden of Showing Reduced Culpability. — Evidence of limited mental capacity, by itself, does not require the trial court to find mitigating circumstances. Defendant bears the burden of showing beyond a reasonable doubt that his lack of capacity significantly reduced defendant's culpability for the offense charged. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Evidence Held Insufficient. — Although defendant on trial for burglary, rape and common-law robbery offered evidence that he was intoxicated on the night in question and that he had only fourth or fifth grade reading and writing skills, he failed to show conclusively that either disability somehow reduced his culpability for the offenses charged; thus, the trial court was not required to find voluntary intoxication or limited mental capacity as a factor in mitigation. State v. Redfern, 98 N.C. App. 129, 389 S.E.2d 846 (1990).

F. Participation or Consent of Victim.

Factor Not Found. — Where the evidence did not so clearly establish the fact in issue that no reasonable inference to the contrary could be drawn, the trial court did not err in failing to find as a mitigating factor that the victims were more that 16 years old and willing participants in defendant's conduct. State v. Mixion, 118 N.C. App. 559, 455 S.E.2d 904 (1995).

H. Strong Provocation or Extenuating Relationship.

Conflict with Aggravating Factor Not Established. — Mitigating factor that relationship between defendant and her husband, victim of conspiracy to commit murder was an extenuating circumstance did not conflict with aggravating factor that defendant took advantage of position of trust or confidence vis-à-vis her husband, as the mitigating factor was based on evidence that victim told defendant that he was a homosexual and had had an affair with the principal in the conspiracy. State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991).

Relationship Between Husband and Wife. — A relationship between husband and wife, including marital difficulties in the past, is not sufficient, standing alone, to support a finding of the mitigating factor that the relationship between defendant and victim was extenuating. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

Strong Provocation Not Shown. — Where defendant confronted victim the day after defendant received information that victim had molested defendant's daughter, the lapse of time between the provocation and defendant's actions tended to contradict defendant's contention that he acted under strong provocation. State v. Foster, 101 N.C. App. 153, 398 S.E.2d 664 (1990).

Given the lapse of time between the previous encounter between defendant and victim and the time of the shooting and given the absence of any weapon on victim's person at the time of the shooting, uncontradicted evidence of strong provocation did not exist. State v. Wills, 110 N.C. App. 206, 429 S.E.2d 376, cert. denied, 334 N.C. 438, 433 S.E.2d 184 (1993).

Extenuating Relationship Not Shown. — Trial court was not required to find that an extenuating relationship between defendant and victim existed such that defendant's conviction for murder of victim was mitigated. Although woman told defendant the victim had been "torturing" and otherwise mistreating her, since there was evidence of a scheme between woman and defendant to burn the trailer, the trial court did find defendant's relationship with woman mitigated his alleged arson of her trailer; however, any relationship between defendant and the woman did not necessarily compel the trial court to find a similar extenuating relationship existed between defendant and the murder victim. State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251, cert. denied, 325 N.C. 276, 384 S.E.2d 528 (1989).

Despite evidence that murder defendant's relationship with his victim (also his wife) was mutually stormy and difficult, the court could not conclusively determine that the mitigating factor of extenuating relationship existed. State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363, cert. denied, 334 N.C. 437, 433 S.E.2d 183 (1993).

J. Voluntary Acknowledgment of Wrongdoing.

Time of Confession. — In order to be absolutely entitled to a finding of a mitigating factor regarding defendant's voluntary acknowledgment of wrongdoing, defendant must make his confession prior to the issuance of a warrant or information, prior to the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first; and since defendant made his statement after his arrest, he was not absolutely entitled to a finding of this mitigating factor, and it was for the trial judge to determine, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating factor. State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991).

Requirement Goes to Weight of Factor. — Requirement that restitution must be prompted by repentance for the deed, and not solely by fear of punishment does not go to the existence of the mitigating factor, but to its weight. State v. McDonald, 94 N.C. App. 371, 380 S.E.2d 406 (1989).

Defendant Not Entitled to Factor. —

Trial court did not abuse its discretion in not finding the factor described in former § 15A-1340.4(a)(2)*l* where defendant only admitted wrongdoing after his arrest. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

When Defendant Moves to Suppress His Confession. — When a defendant moves to suppress a confession, he repudiates it and is not entitled to use evidence of the confession to prove the mitigating circumstances of voluntarily acknowledging wrongdoing. State v. Ruffin, 90 N.C. App. 152, 370 S.E.2d 275 (1988).

Substantial or Full Restitution Not Found. — Trial court did not err when it failed to find as a statutory mitigating factor that the defendant made substantial or full restitution to the victim where the defendant initially abandoned the property, but later led police to its location so the police could return it to the victim and where the property was not returned in the condition in which it was stolen. State v. McDonald, 94 N.C. App. 371, 380 S.E.2d 406 (1989).

K. Good Character or Reputation.

Defendant Not Entitled to Factor. —

Trial court's failure to find mitigating factor was not reversible error where defendant's character witness did not testify as to defendant's reputation in community and although testimony was uncontradicted evidence of good character, witness testified that she and defendant were very good friends but she had known defendant for only five months. State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989).

Where defendant's only evidence as to his good reputation in community was testimony of his mother and where defendant had been away from community for ten years and had returned only two or three months prior to crime, trial court did not err in declining to find, as statutory mitigating factor, defendant's good reputation in community. State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989).

Trial judge's refusal to find as a mitigating factor that defendant was of good character was not improper where the record established, at best, that there was an absence of bad character. State v. Turner, 103 N.C. App. 331, 406 S.E.2d 147 (1991).

N. Nonstatutory Factors.

Rendering Aid to Victim. —

Rendering aid to a victim is not a statutory mitigating factor; therefore a finding of this mitigating factor is in the exercise of the trial judge's sound discretion. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Defendant Victim of Child Abuse. —

The trial court did not abuse its discretion under the circumstances of this case by declining to find as a factor in mitigation that defendant charged with child abuse was himself the victim of child abuse. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

Defendant's Prison Conduct. — The trial court in its discretion did not err in failing to find defendant's prison conduct to be a mitigating factor in determining what sentences to impose for all his convictions. State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988).

Rejection of Self-Defense as Mitigating Factor Upheld. — Statement made by trial judge to the effect that defendant used self-defense as a defense and the jury rejected it and the court did likewise did not require the conclusion that trial judge relied on the jury verdict in making its decision on the aggravating factor in question. The record clearly showed that prior to the jury verdict, the trial court did not believe defendant was acting in self-defense. Therefore, the trial court did not err in its rejection of self-defense as a factor in mitigation. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Trial court did not abuse its discretion in refusing to find defendant's requested nonstatutory factor in mitigation that defendant had sought treatment for his alcoholism where defendant stated that on the weekend before sentencing, he had a few beers. State v. Santon, 101 N.C. App. 710, 401 S.E.2d 117 (1991).

IV. FINDINGS OF COURT.

Specific Evidence Relied on Need Not Be Specified. — When finding an aggravating factor, the sentencing judge does not have to specify the specific evidence on which he relied to find that factor. The record, however, must contain sufficient evidence to support the aggravating factor. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Judge Did Not Need to Make Findings in Aggravation and Mitigation. — Trial court did not err in sentencing defendant to two consecutive 40-year terms for trafficking in cocaine without finding any aggravating factors; the statutory mandatory minimum sentence for each conviction of trafficking in more than 400 grams of cocaine is 35 years in prison and since each of the 40-year sentences pronounced was less than the total of the presumptive terms of the consolidated convictions, the trial court's sentences for the substantive offenses were lawful. State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989).

Evidence Held Sufficient to Support Finding. — There was sufficient evidence from which the trial judge could find by a preponderance of the evidence that defendant was armed with a deadly weapon at the time he broke into elderly woman's home. Where the evidence tended to show defendant first acquired the revolver when he shot trooper and had it with him when he was captured, also co-defendant's testimony provided direct evidence defendant had trooper's revolver at the time he entered the house. State v. Rios, 322 N.C. 596, 369 S.E.2d 576 (1988).

§ 15A-1340.16A. Enhanced sentence if defendant is convicted of a Class A, B1, B2, C, D, or E felony and the defendant used, displayed, or threatened to use or display a firearm during the commission of the felony.

(a) If a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months. The court shall not suspend the 60-month minimum term of imprisonment imposed as an enhanced sentence under this section and shall not place any person sentenced under this section on probation for the enhanced sentence.

(b) Subsection (a) of this section does not apply in any of the following circumstances:

(1) The person is not sentenced to an active term of imprisonment.

(2) The evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying Class A, B1, B2, C, D, or E felony.

(3) The person did not actually possess a firearm about his or her person. (1994, Ex. Sess., c. 22, s. 20.)

Editor's Note. — Session Laws 1994, Extra Session, c. 22, which enacted this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 22, s. 24, makes this section effective on the date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses committed on or after that date.

Session Laws 1994, Extra Session, c. 22, which added this section, in s. 24 provides: "Prosecutions for, or sentences based on, offenses committed before the effective dates of this Part are not abated or affected by this Part, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this Part remain applicable to those prosecutions or sentences."

§ 15A-1340.17. Punishment limits for each class of offense and prior record level.

(a) Offense Classification; Default Classifications. — The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a felony for which there is no classification, it is a Class I felony.

(b) Fines. — Any judgment that includes a sentence of imprisonment may also include a fine. If a community punishment is authorized, the judgment may consist of a fine only. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. Unless otherwise provided, the amount of the fine is in the discretion of the court.

(c) Punishments for Each Class of Offense and Prior Record Level; Punishment Chart Described. — The authorized punishment for each class of offense and prior record level is as specified in the chart below. Prior record levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offense are indicated by the letters placed vertically on the left side of the chart. Each cell on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; "A" indicates that an active punishment is authorized; and "Life Imprisonment Without Parole" indicates that the defendant shall be imprisoned for the remainder of the prisoner's natural life.

(2) A presumptive range of minimum durations, if the sentence of imprisonment is neither aggravated or mitigated; any minimum term of imprisonment in that range is permitted unless the court finds pursuant to G.S. 15A-1340.16 that an aggravated or mitigated sentence is appropriate. The presumptive range is the middle of the three ranges in the cell.

(3) A mitigated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that a mitigated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the mitigated range is permitted. The mitigated range is the lower of the three ranges in the cell.

(4) An aggravated range of minimum durations if the court finds pursuant to G.S. 15A-1340.16 that an aggravated sentence of imprisonment is justified; in such a case, any minimum term of imprisonment in the aggravated range is permitted. The aggravated range is the higher of the three ranges in the cell.

PRIOR RECORD LEVEL

	I 0 Pts	II 1-4 Pts	III 5-8 Pts	IV 9-14 Pts	V 15-18 Pts	VI 19+ Pts	
A	Life Imprisonment or Death as Established by Statute						
	A	A	A	A	A	A	DISPOSITION
	240-300	288-360	336-420	384-480	Life Imprisonment Without Parole		Aggravated
B1	192-240	230-288	269-336	307-384	346-433	384-480	PRESUMPTIVE
	144-192	173-230	202-269	230-307	260-346	288-384	Mitigated
	A	A	A	A	A	A	DISPOSITION
	157-196	189-237	220-276	251-313	282-353	313-392	Aggravated
B2	125-157	151-189	176-220	201-251	225-282	251-313	PRESUMPTIVE
	94-125	114-151	132-176	151-201	169-225	188-251	Mitigated
	A	A	A	A	A	A	DISPOSITION
	73-92	100-125	116-145	133-167	151-188	168-210	Aggravated
C	58-73	80-100	93-116	107-133	121-151	135-168	PRESUMPTIVE
	44-58	60-80	70-93	80-107	90-121	101-135	Mitigated
	A	A	A	A	A	A	DISPOSITION
	64-80	77-95	103-129	117-146	133-167	146-183	Aggravated
D	51-64	61-77	82-103	94-117	107-133	117-146	PRESUMPTIVE
	38-51	46-61	61-82	71-94	80-107	88-117	Mitigated
	I/A	I/A	A	A	A	A	DISPOSITION
	25-31	29-36	34-42	46-58	53-66	59-74	Aggravated
E	20-25	23-29	27-34	37-46	42-53	47-59	PRESUMPTIVE
	15-20	17-23	20-27	28-37	32-42	35-47	Mitigated
	I/A	I/A	I/A	A	A	A	DISPOSITION
	16-20	19-24	21-26	25-31	34-42	39-49	Aggravated
F	13-16	15-19	17-21	20-25	27-34	31-39	PRESUMPTIVE
	10-13	11-15	13-17	15-20	20-27	23-31	Mitigated
	I/A	I/A	I/A	I/A	A	A	DISPOSITION
	13-16	15-19	16-20	20-25	21-26	29-36	Aggravated
G	10-13	12-15	13-16	16-20	17-21	23-29	PRESUMPTIVE
	8-10	9-12	10-13	12-16	13-17	17-23	Mitigated
	C/I/A	I/A	I/A	I/A	I/A	A	DISPOSITION
	6-8	8-10	10-12	11-14	15-19	20-25	Aggravated
H	5-6	6-8	8-10	9-11	12-15	16-20	PRESUMPTIVE
	4-5	4-6	6-8	7-9	9-12	12-16	Mitigated
	C	C/I	I	I/A	I/A	I/A	DISPOSITION
	6-8	6-8	6-8	8-10	9-11	10-12	Aggravated
I	4-6	4-6	5-6	6-8	7-9	8-10	PRESUMPTIVE
	3-4	3-4	4-5	4-6	5-7	6-8	Mitigated

(d) Maximum Sentences Specified for Class F through Class I Felonies. — Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class F through Class I felonies. The first figure in each cell in the table is the minimum term and the second is the maximum term.

3-4	4-5	5-6	6-8	7-9	8-10	9-11	10-12
11-14	12-15	13-16	14-17	15-18	16-20	17-21	18-22

19-23	20-24	21-26	22-27	23-28	24-29	25-30	26-32
27-33	28-34	29-35	30-36	31-38	32-39	33-40	34-41
35-42	36-44	37-45	38-46	39-47	40-48	41-50	42-51
43-52	44-53	45-54	46-56	47-57	48-58	49-59	

(e) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms up to 339 Months. — Unless provided otherwise in a statute establishing a punishment for a specific crime, for each minimum term of imprisonment in the chart in subsection (c) of this section, expressed in months, the corresponding maximum term of imprisonment, also expressed in months, is as specified in the table below for Class B1 through Class E felonies. The first figure in each cell of the table is the minimum term and the second is the maximum term.

15-27	16-29	17-30	18-31	19-32	20-33	21-35	22-36
23-37	24-38	25-39	26-41	27-42	28-43	29-44	30-45
31-47	32-48	33-49	34-50	35-51	36-53	37-54	38-55
39-56	40-57	41-59	42-60	43-61	44-62	45-63	46-65
47-66	48-67	49-68	50-69	51-71	52-72	53-73	54-74
55-75	56-77	57-78	58-79	59-80	60-81	61-83	62-84
63-85	64-86	65-87	66-89	67-90	68-91	69-92	70-93
71-95	72-96	73-97	74-98	75-99	76-101	77-102	78-103
79-104	80-105	81-107	82-108	83-109	84-110	85-111	86-113
87-114	88-115	89-116	90-117	91-119	92-120	93-121	94-122
95-123	96-125	97-126	98-127	99-128	100-129	101-131	102-132
103-133	104-134	105-135	106-137	107-138	108-139	109-140	110-141
111-143	112-144	113-145	114-146	115-147	116-149	117-150	118-151
119-152	120-153	121-155	122-156	123-157	124-158	125-159	126-161
127-162	128-163	129-164	130-165	131-167	132-168	133-169	134-170
135-171	136-173	137-174	138-175	139-176	140-177	141-179	142-180
143-181	144-182	145-183	146-185	147-186	148-187	149-188	150-189
151-191	152-192	153-193	154-194	155-195	156-197	157-198	158-199
159-200	160-201	161-203	162-204	163-205	164-206	165-207	166-209
167-210	168-211	169-212	170-213	171-215	172-216	173-217	174-218
175-219	176-221	177-222	178-223	179-224	180-225	181-227	182-228
183-229	184-230	185-231	186-233	187-234	188-235	189-236	190-237
191-239	192-240	193-241	194-242	195-243	196-245	197-246	198-247
199-248	200-249	201-251	202-252	203-253	204-254	205-255	206-257
207-258	208-259	209-260	210-261	211-263	212-264	213-265	214-266
215-267	216-269	217-270	218-271	219-272	220-273	221-275	222-276
223-277	224-278	225-279	226-281	227-282	228-283	229-284	230-285
231-287	232-288	233-289	234-290	235-291	236-293	237-294	238-295
239-296	240-297	241-299	242-300	243-301	244-302	245-303	246-305
247-306	248-307	249-308	250-309	251-311	252-312	253-313	254-314
255-315	256-317	257-318	258-319	259-320	260-321	261-323	262-324
263-325	264-326	265-327	266-329	267-330	268-331	269-332	270-333
271-335	272-336	273-337	274-338	275-339	276-341	277-342	278-343
279-344	280-345	281-347	282-348	283-349	284-350	285-351	286-353
287-354	288-355	289-356	290-357	291-359	292-360	293-361	294-362
295-363	296-365	297-366	298-367	299-368	300-369	301-371	302-372
303-373	304-374	305-375	306-377	307-378	308-379	309-380	310-381
311-383	312-384	313-385	314-386	315-387	316-389	317-390	318-391
319-392	320-393	321-395	322-396	323-397	324-398	325-399	326-401
327-402	328-403	329-404	330-405	331-407	332-408	333-409	334-410
335-411	336-413	337-414	338-415	339-416			

(e1) Maximum Sentences Specified for Class B1 through Class E Felonies for Minimum Terms of 340 Months or More. — Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is 340 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus nine additional months. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 14, ss. 20, 21; c. 22, s. 7; c. 24, s. 14(b); 1995, c. 507, s. 19.5(*l*).)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after the effective date of this Part. Prosecution for offenses occurring before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Session Laws 1994, Extra Session, c. 14, ss. 20 and 21, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

Session Laws 1994, Extra Session, c. 22, s. 7, which amended this section, was effective on the same date that Chapter 538 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, rewrote the ranges of minimum durations on the chart following subdivision (c)(4) for classes B2, C, and D, and added the "A" sentence disposition in the first and second columns for class H.

§§ 15A-1340.18, 15A-1340.19: Reserved for future codification purposes.

Part 3. Misdemeanor Sentencing.

§ 15A-1340.20. Procedure and incidents of sentence of imprisonment for misdemeanors.

(a) Application to Misdemeanors Only. — This Part applies to sentences imposed for misdemeanor convictions.

(b) Procedure Generally; Term of Imprisonment. — A sentence imposed for a misdemeanor shall contain a sentence disposition specified for the class of offense and prior conviction level, and any sentence of imprisonment shall be within the range specified for the class of offense and prior conviction level, unless applicable statutes require otherwise. The kinds of sentence dispositions are active punishment, intermediate punishment, and community punishment. Except for the work and earned time credits authorized by G.S. 162-60, or earned time credits authorized by G.S. 15A-1355(c), if applicable, an offender whose sentence of imprisonment is activated shall serve each day of the term imposed.

(c) Suspension of Sentence. — Unless otherwise provided, the court shall suspend a sentence of imprisonment if the class of offense and prior conviction level requires community or intermediate punishment as a sentence disposition.

(d) Earned Time Authorization. — An offender sentenced to a term of imprisonment that is activated is eligible to receive earned time credit for misdemeanant offenders awarded by the Department of Correction or the custodian of a local confinement facility, pursuant to rules adopted in accordance with law and pursuant to G.S. 162-60. These rules and statute combined shall not award misdemeanant offenders more than four days of earned time credit per month of incarceration. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 1.)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

§ 15A-1340.21. Prior conviction level for misdemeanor sentencing.

(a) Generally. — The prior conviction level of a misdemeanor offender is determined by calculating the number of the offender's prior convictions that the court finds to have been proven in accordance with this section.

(b) Prior Conviction Levels for Misdemeanor Sentencing. — The prior conviction levels for misdemeanor sentencing are:

(1) Level I — 0 prior convictions.
(2) Level II — At least 1, but not more than 4 prior convictions.
(3) Level III — At least 5 prior convictions.

(c) Proof of Prior Convictions. — A prior conviction shall be proved by any of the following methods:

(1) Stipulation of the parties.
(2) An original or copy of the court record of the prior conviction.
(3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
(4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. Evidence presented by either party at trial may be utilized to prove prior convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. If a motion is made pursuant to that section during the sentencing stage of the criminal action, the court may grant a continuance of the sentencing hearing.

(d) Multiple Prior Convictions Obtained in One Court Week. — For purposes of this section, if an offender is convicted of more than one offense in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 13.1.)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

§ 15A-1340.22. Multiple convictions.

(a) Limits on Consecutive Sentences. — If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the cumulative length of the sentences of imprisonment shall not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.

(b) Consolidation of Sentences. — If an offender is convicted of more than one offense at the same session of court, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. Any sentence imposed shall be consistent with the appropriate prior conviction level of the most serious offense. (1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b); 1995 (Reg. Sess., 1996), c. 742, s. 16.)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, inserted "Class A1" preceding "Class 1, or Class 2" in subsection (a).

§ 15A-1340.23. Punishment limits for each class of offense and prior conviction level.

(a) Offense Classification; Default Classifications. — The offense classification is as specified in the offense for which the sentence is being imposed. If the offense is a misdemeanor for which there is no classification, it is as classified in G.S. 14-3.

(b) Fines. — Any judgment that includes a sentence of imprisonment may also include a fine. Additionally, when the defendant is other than an individual, the judgment may consist of a fine only. If a community punishment is authorized, the judgment may consist of a fine only. Unless otherwise provided for a specific offense, the maximum fine that may be imposed is two hundred dollars ($200.00) for a Class 3 misdemeanor and one thousand dollars ($1,000) for a Class 2 misdemeanor. The amount of the fine for a Class 1 misdemeanor and a Class A1 misdemeanor is in the discretion of the court.

(c) Punishment for Each Class of Offense and Prior Conviction Level; Punishment Chart Described. — Unless otherwise provided for a specific offense, the authorized punishment for each class of offense and prior conviction level is as specified in the chart below. Prior conviction levels are indicated by the Roman numerals placed horizontally on the top of the chart. Classes of offenses are indicated by the Arabic numbers placed vertically on the left side of the chart. Each grid on the chart contains the following components:

(1) A sentence disposition or dispositions: "C" indicates that a community punishment is authorized; "I" indicates that an intermediate punishment is authorized; and "A" indicates that an active punishment is authorized; and

(2) A range of durations for the sentence of imprisonment: any sentence within the duration specified is permitted.

	PRIOR CONVICTION LEVELS		
MISDEMEANOR OFFENSE	LEVEL I	LEVEL II	LEVEL III
CLASS	No Prior Convictions	One to Four Prior Convictions	Five or More Prior Convictions
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/I	1-60 days C/I/A
3	1-10 days C	1-15 days C/I	1-20 days C/I/A.

(1993, c. 538, s. 1; 1994, Ex. Sess., c. 24, s. 14(b); 1995, c. 507, s. 19.5(g).)

Editor's Note. — Session Laws 1993, c. 538, which enacts this Article effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, added "and a Class A1 misdemeanor" in the last sentence of subsection (b); and in the prior conviction levels chart following subdivision (c)(2) added the entries under each column for the misdemeanor offense class A1.

ARTICLE 82.

Probation.

§ 15A-1341. Probation generally.

(a) Use of Probation. — Unless specifically prohibited, a person who has been convicted of any criminal offense may be placed on probation as provided by this Article if the class of offense of which the person is convicted and the person's prior record or conviction level under Article 81B of this Chapter authorizes a community or intermediate punishment as a type of sentence disposition or if the person is convicted of impaired driving under G.S. 20-138.1.

(a1) Deferred Prosecution. — A person who has been charged with a Class H or I felony or a misdemeanor may be placed on probation as provided in this Article on motion of the defendant and the prosecutor if the court finds each of the following facts:

(1) Prosecution has been deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(2) Each known victim of the crime has been notified of the motion for probation by subpoena or certified mail and has been given an opportunity to be heard.

(3) The defendant has not been convicted of any felony or of any misdemeanor involving moral turpitude.

(4) The defendant has not previously been placed on probation and so states under oath.

(5) The defendant is unlikely to commit another offense other than a Class 3 misdemeanor.

(b) Supervised and Unsupervised Probation. — The court may place a person on supervised or unsupervised probation. A person on unsupervised probation is subject to all incidents of probation except supervision by or assignment to a probation officer.

(c) **(Repealed effective January 1, 1997 upon approval of constitutional amendment)** Election to Serve Sentence or Be Tried on Charges. — Any person placed on probation may at any time during the probationary period elect to serve his suspended sentence of imprisonment in lieu of the remainder of his probation. Any person placed on probation upon deferral of prosecution may at

§ 15A-1341(c) has a delayed repeal date. See notes.

any time during the probationary period elect to be tried upon the charges deferred in lieu of remaining on probation. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 4A, 5; 1981, c. 377, ss. 2, 3; 1993, c. 538, s. 15; 1994, Ex. Sess., c. 24, s. 14(b); 1995, c. 429, s. 1.)

Editor's Note. —

Session Laws 1993, c. 538, s. 15, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1995, c. 429, s. 5, provides that if the constitutional amendment proposed by Session Laws 1995, c. 429, s. 2, is approved, subsection (c) is repealed, effective January 1, 1997, and the repeal of subsection (c) applies to any person whose criminal offense occurred on or after that date.

Effect of Amendments. — The 1995 amendment repeals subsection (c). For effective date and applicability of this amendment, see the editor's note.

Legal Periodicals. —

For note, "The Modern-Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions," see 5 Duke L.J. 1357 (1989).

CASE NOTES

Pretrial Assignment to DAPP. — The legislature has provided for pretrial assignment of a defendant to the Division of Adult Probation and Parole only upon deferred prosecution, and upon the agreement to assume supervision of the person. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

Court Had No Authority to Order DAPP to Supervise Defendant. — Superior court had no authority to enter order requiring Division of Adult Probation and Parole, without its consent, to provide supervision of defendant, who had been determined incompetent to stand trial but not subject to involuntary commitment, while in custody of his former wife. State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

§ 15A-1342. Incidents of probation.

(a) Period. — The court may place a convicted offender on probation for the appropriate period as specified in G.S. 15A-1343.2(d), not to exceed a maximum of five years. The court may place a defendant as to whom prosecution has been deferred on probation for a maximum of two years. The probation remains conditional and subject to revocation during the period of probation imposed, unless terminated as provided in subsection (b) or G.S. 15A-1341(c).

Extension. — The court with the consent of the defendant may extend the period of probation beyond the original period (i) for the purpose of allowing the defendant to complete a program of restitution, or (ii) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of the probation. The period of extension shall not exceed three years beyond the original period of probation. The special extension authorized herein may be ordered only in the last six months of the original period of probation. Any probationary judgment form provided to a defendant on supervised probation shall state that probation may be extended pursuant to this subsection.

(b) Early Termination. — The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection (a) if warranted by the conduct of the defendant and the ends of justice.

(c) Conditions; Suspended Sentence. — When the court places a convicted offender on probation, it must determine conditions of probation as provided in G.S. 15A-1343. In addition, it must impose a suspended sentence of imprisonment, determined as provided in Article 83, Imprisonment, which may be activated upon violation of conditions of probation.

(d) Mandatory Review of Probation. — Each probation officer must bring the cases of each probationer assigned to him before a court with jurisdiction to review the probation when the probationer has served three years of a probationary period greater than three years. The probation officer must give reasonable notice to the probationer, and the probationer may appear. The court must review the case file of a probationer so brought before it and determine whether to terminate his probation.

(e) Out-of-State Supervision. — Supervised probationers are subject to out-of-State supervision under the provisions of G.S. 148-65.1.

(f) Appeal from Judgment of Probation. — A defendant may seek post-trial relief from a judgment which includes probation notwithstanding the authority of the court to modify or revoke the probation.

(g) Invalid Conditions; Timing of Objection. — The regular conditions of probation imposed pursuant to G.S. 15A-1343(b) are in every circumstance valid conditions of probation. A court may not revoke probation for violation of an invalid condition imposed pursuant to G.S. 15A-1343(b1). The failure of a defendant to object to a condition of probation imposed pursuant to G.S. 15A-1343(b1) at the time such a condition is imposed does not constitute a waiver of the right to object at a later time to the condition.

(h) Limitation on Jurisdiction to Alter or Revoke Unsupervised Probation. — In the judgment placing a person on unsupervised probation, the judge may limit jurisdiction to alter or revoke the sentence under G.S. 15A-1344. When jurisdiction to alter or revoke is limited, the effect is as provided in G.S. 15A-1344(b).

(i) Immunity from Prosecution upon Compliance. — Upon the expiration or early termination as provided in subsection (b) of a period of probation imposed after deferral of prosecution and before conviction, the defendant shall be immune from prosecution of the charges deferred.

(j) Immunity for Injury to Defendant Performing Community Service. — Immunity from liability for injury to a defendant performing community service shall be as set forth in G.S. 143B-475.1(d). (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 6, 7; 1981, c. 377, ss. 4-6; 1983, c. 435, s. 5.1; c. 561, s. 7; 1985 (Reg. Sess., 1986), c. 960, s. 1; 1993, c. 84, s. 1; 1993 (Reg. Sess., 1994), c. 767, s. 6; 1995, c. 330, s. 1.)

Editor's Note. —

Session Laws 1993, c. 84, s. 1, which amends subsection (a), provides in section 3 that the act is effective March 1, 1994, and applies to persons placed on probation or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Effect of Amendments. — The 1995 amendment, effective June 26, 1995, rewrote subsection (j).

§ 15A-1343. Conditions of probation.

(a) In General. — The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.

(b) Regular Conditions. — As regular conditions of probation, a defendant must:

(1) Commit no criminal offense in any jurisdiction.

(2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.

(3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

(4) Satisfy child support and other family obligations as required by the court. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).

(5) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court.

(6) Pay a supervision fee as specified in subsection (c1).

(7) Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip him for suitable employment. A defendant pursuing a course of study or of vocational training shall abide by all of the rules of the institution providing the education or training, and the probation officer shall forward a copy of the probation judgment to that institution and request to be notified of any violations of institutional rules by the defendant.

(8) Notify the probation officer if he fails to obtain or retain satisfactory employment.

(9) Pay the costs of court, any fine ordered by the court, and make restitution or reparation as provided in subsection (d).

(10) Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation.

(11) At a time to be designated by his probation officer, visit with his probation officer a facility maintained by the Division of Prisons.

In addition to these regular conditions of probation, a defendant required to serve an active term of imprisonment as a condition of special probation pursuant to G.S. 15A-1344(e) or G.S. 15A-1351(a) shall, as additional regular conditions of probation, obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within 72 hours of his discharge from the active term of imprisonment.

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

Defendants placed on unsupervised probation are subject to the provisions of this subsection, except that defendants placed on unsupervised probation are not subject to the regular conditions contained in subdivisions (2), (3), (6), (8), and (11).

(b1) Special Conditions. — In addition to the regular conditions of probation specified in subsection (b), the court may, as a condition of probation, require that during the probation the defendant comply with one or more of the following special conditions:

(1) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(2) Attend or reside in a facility providing rehabilitation, counseling, treatment, social skills, or employment training, instruction, recreation, or residence for persons on probation.

(2a) Submit to a period of imprisonment in a facility for youthful offenders for a minimum of 90 days or a maximum of 120 days under special probation, reference G.S. 15A-1351(a) or G.S. 15A-1344(e), and abide by all rules and regulations as provided in conjunction with the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), which provides an atmosphere for learning personal confidence, personal responsibility, self-respect, and respect for attitudes and value systems.

(3) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).

(3a) Remain in one or more specified places for a specified period or periods each day, and wear a device that permits the defendant's compliance with the condition to be monitored electronically.

(3b) Submit to supervision by officers assigned to the Intensive Probation Program established pursuant to G.S. 143B-262(c), and abide by the rules adopted for that Program.

(4) Surrender his driver's license to the clerk of superior court, and not operate a motor vehicle for a period specified by the court.

(5) Compensate the Department of Environment, Health, and Natural Resources or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Environment, Health, and Natural Resources or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the

court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).

(6) Perform community or reparation service and pay any fee required by law or ordered by the court for participation in the community or reparation service program.

(7) Submit at reasonable times to warrantless searches by a probation officer of his person and of his vehicle and premises while he is present, for purposes specified by the court and reasonably related to his probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

(8) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(8a) Purchase the least expensive annual statewide license or combination of licenses to hunt, trap, or fish listed in G.S. 113-270.2, 113-270.3, 113-270.5, 113-271, 113-272, and 113-272.2 that would be required to engage lawfully in the specific activity or activities in which the defendant was engaged and which constitute the basis of the offense or offenses of which he was convicted.

(9) If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and may order the defendant to pay the cost of such treatment.

(10) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

(b2) Special Conditions of Probation for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — As special conditions of probation, a defendant who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, must:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the court.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless the court expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the minor child's best interest to allow the probationer to reside in the same household with a minor child.

(6) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

Defendants subject to the provisions of this subsection shall not be placed on unsupervised probation.

(c) Statement of Conditions. — A defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released. If any modification of the terms of that probation is subsequently made, he must be given a written statement setting forth the modifications.

(c1) Supervision Fee. — Any person placed on supervised probation pursuant to subsection (a) shall pay a supervision fee of twenty dollars ($20.00) per month, unless exempted by the court. The court may exempt a person from paying the fee only for good cause and upon written motion of the person placed on supervised probation. No person shall be required to pay more than one supervision fee per month. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by such methods if he is authorized by subsection (g) to determine the payment schedule. Supervision fees must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, including all real and personal property owned by the defendant and the income derived from such property, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution or reparation, but the court is not required to make findings of fact or conclusions of law on these matters when the sentence is imposed. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay. An order providing for restitution or reparation shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed by the defendant, but any amount paid by the defendant under the terms of an order as provided herein shall be credited against any judgment rendered against the defendant in such civil action. As used herein, "restitution" shall mean (i) compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action, and (ii) reimbursement to the State for the total amount of a judgment authorized by G.S. 7A-455(b). As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein "aggrieved party" includes individuals, firms, corporations, associations, other organizations, and government agencies, whether federal, State or local, including the Crime Victims Compensation Fund established by G.S. 15B-23. Provided, that no government agency shall benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs and except that the State may receive restitution for the total amount of a judgment authorized by G.S. 7A-455(b). A government agency may benefit by way of reparation even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done. Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant, but the liability of a third party to pay indemnity to an aggrieved party or any payment of indemnity actually made by a third party to an aggrieved party does not prohibit or limit in any way the power of the court to require the defendant to make complete and full restitution or reparation to the aggrieved party for the total amount of the damage or loss caused by the defendant. Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders, to provide for compensation to victims of crime, and to reimburse the Crime Victims Compensation Fund established by G.S. 15B-23, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State.

(e) Costs of Court and Appointed Counsel. — Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and costs for appointed counsel or public defender in the case in which he was convicted. The court shall determine the amount due and the method of payment.

(f) Repealed by Session Laws 1983, c. 561, s. 5, effective October 1, 1983.

(g) Probation Officer May Determine Payment Schedules. — If a person placed on supervised probation is required as a condition of that probation to pay any moneys to the clerk of superior court, the court may delegate to a probation officer the responsibility to determine the payment schedule. The court may also authorize the probation officer to transfer the person to unsupervised probation after all the moneys are paid to the clerk. If the probation officer transfers a person to unsupervised probation, he must notify the clerk of that action. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1; c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2; 1983, c. 135, s. 1; c. 561, ss. 1-6; c. 567, s. 2; c. 712, s. 1; 1983 (Reg. Sess., 1984), c. 972, ss. 1, 2; 1985, c. 474, ss. 1, 7, 8; 1985 (Reg. Sess., 1986), c. 859, ss. 1, 2; 1987, c. 282, s. 33; c. 397, s. 1; c. 579, ss. 1, 2; c. 598, s. 1; c. 819, s. 32; c. 830, s. 17; 1989, c. 529, s. 5; c. 727, s. 218(4); 1989 (Reg. Sess., 1990), c. 1010, s. 1; c. 1034, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 1; 1993, c. 538, s. 16; 1994, Ex. Sess., c. 9, s. 1; c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(c).)

Editor's Note. —

Session Laws 1989 (Reg. Sess., 1990), c. 1010, which added subdivision (b1)(2a), provided in s. 2:

"Sec. 2. The Department of Correction shall use residential programs with the goal of providing alternatives to long-term imprisonment of youthful first offenders, such as the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), for offenders placed on probation under Section 1 of this act [subdivision (b1)(2a)]."

Session Laws 1993, c. 538, s. 16, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 24, s. 19(a) and (b) appropriates funds to the Department of Correction for the operation of a boot camp for youthful offenders and a post-boot camp program for certain probationers likely to benefit therefrom.

Session Laws 1994, Extra Session, c. 24, s. 19, as amended by Session Laws 1995, c. 324, s. 19.3, provides:

"(c) The Department of Correction shall evaluate the IMPACT program and the post-Boot Camp probation program funded under this section [s. 19 of c. 24] and report by January 1 of each year to the Joint Legislative Commission on Govermental Operations, the Joint Legislative Corrections Oversight Committee, and the Fiscal Research Division. The evaluation of the IMPACT program and the post-Boot Camp probation program shall include a comparison of that program's effectiveness, cost, and recidivism rate to other corrections programs for offenders in the same age group and similar offense classes as that covered by the IMPACT program."

Session Laws 1994, Extra Session, c. 24, s. 70, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1989, c. 529, s. 5, which amended this section, became effective October 1, 1989, and applied to child support orders entered or modified on or after that date.

Session Laws 1989 (Reg. Sess., 1990), c. 1034, s. 1, which amended this section, became effective October 1, 1990, and applied to all persons on supervised probation or parole prior to that date, and to all persons on supervised probation or parole on or after that date.

Session Laws 1995, c. 324, s. 1.1, provides: "This act shall be known as the Continuation Budget Operations Appropriations Act of 1995."

Session Laws 1995, c. 324, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1995-97 biennium."

Session Laws 1995, c. 324, s. 28.4 is a severability clause.

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1994 Extra Session amendment by c. 9, s. 1, effective May 1, 1994, added the second sentence of subdivision (b)(7).

The 1996 Second Extra Session amendment, effective December 1, 1996, added subsection (c).

CASE NOTES

I. General Consideration.
II. Valid Conditions.
IV. Restitution.

I. GENERAL CONSIDERATION.

Legislative Intent. — The legislature plainly did not intend that this section import wholesale each and every condition precedent to recovery in a civil action as bearing on the trial court's requiring appropriate restitution as a condition of probation. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

By tying the amount which may be imposed as restitution to such compensation as could ordinarily be recovered in a civil action, the General Assembly meant only that the trial court must refer to the measure of recoverable damages applying in the relevant civil action — such as the measure of damages in a wrongful death action — for the limited purpose of computing an appropriate restitutionary amount to be imposed as a condition of probation. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Statute of Limitations in § 1-53(4) Not Applicable. — In the context of sentencing proceedings under subsection (d) of this section, the two-year statute of limitations in § 1-53(4) pertaining to actions instituted under the wrongful death act is not applicable. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Defendant Not Given Written Notice of Modifications. — Where a judge modified a defendant's probation and a written statement setting forth the terms of the new condition was not given to the defendant and where, subsequently, the defendant violated the new condition, the provision of subsection (c) of this section requiring written notice of modifications was mandatory and the modification of the probation terms had no effect; oral notice was not a satisfactory substitute for the written statement. State v. Suggs, 92 N.C. App. 112, 373 S.E.2d 687 (1988).

Applied in State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992).

Cited in State v. Church, 110 N.C. App. 569, 430 S.E.2d 462 (1993).

II. VALID CONDITIONS.

The requirement that defendant attend Alcoholics Anonymous meetings during the period of his supervised probation at least two times per week and that defendant provide his probation officer with verification of such attendance was reasonably related to defendant's rehabilitation. State v. McGill, 114 N.C. App. 479, 442 S.E.2d 166 (1994).

IV. RESTITUTION.

Restitution is intended to be compensatory, not punitive. State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

Restitution Is an Option. — Restitution, imposed as a condition of probation, is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant for the purpose of avoiding the serving of an active sentence. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Restitution Does Not Affect Victim's Right to Institute Civil Action. — An imposition of restitution does not affect, and is not affected by, the victim's right to institute a civil action against the defendant based on the same conduct. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Court Not Required to Consider Ability to Pay. — Trial court did not err in failing to consider defendant's ability to pay restitution, as the potentially binding determination at a later date requiring defendant to pay restitution as a condition of work release or parole by either the Department of Correction or the Parole Commission would by necessity require sufficient evidence of defendant's ability to pay at that time. State v. Wilson, 340 N.C. 720, 459 S.E.2d 192 (1995).

Condition for Probation of Restitution Error Where Defendant Clearly Could Not Comply. —

Trial court erred where it conditioned probation on an amount of restitution the defendant clearly could not pay. State v. Hayes, 113 N.C. App. 172, 437 S.E.2d 717 (1993).

Order Must Be Supported by Evidence. —

A trial court's award of restitution must be supported by competent evidence in the record. State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1992).

Amount of Restitution Must Be Supported by Evidence. —

In accord with main volume. State v. Wilson, 340 N.C. 720, 459 S.E.2d 192 (1995).

Restitution as a condition of a criminal judgment cannot include the requirement that defendant return, to the loser, money paid on a gambling debt. State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (1994).

Award Not Supported by Evidence. — Where an exhaustive review of the record revealed that no evidence was presented at trial or at sentencing which supported the figures offered by the State, the trial court therefore based the amount of restitution only upon the unsworn statements of the prosecutor, which did not constitute evidence and could not support the amount of restitution recommended. State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1992).

Order Vacated. — Order requiring defendant to pay one-third of his income to the clerk was vacated where the record revealed only that the victim was separated from his wife, and that they had two children who lived with their mother at the time the victim died. State v. Easter, 101 N.C. App. 36, 398 S.E.2d 619 (1990).

§ 15A-1343.1. Criteria for selection and sentencing to IMPACT.

The criteria for selecting and sentencing offenders to the Intensive Motivational Program of Alternative Correctional Treatment as provided under G.S. 15A-1343(b1)(2A) shall be as follows:

(1) The offender must be between the ages of 16 and 30;

(2) The offender must be convicted of a Class 1 misdemeanor, Class A1 misdemeanor, or a felony;

(3) The offender must submit to a medical evaluation by a physician approved by his probation or parole officer and must be certified by the physician to be medically fit for program participation.

(4) Repealed by Session Laws 1995, c. 446, s. 1, effective October 1, 1995. (1989 (Reg. Sess., 1990), c. 1010, s. 3; 1993, c. 538, s. 17; 1994, Ex. Sess., c. 24, s. 14(b); 1995, c. 446, s. 1; c. 507, s. 19.5(h).)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1010, which enacted this section, in s. 2 provided:

"The Department of Correction shall use residential programs with the goal of providing alternatives to long-term imprisonment of youthful first offenders, such as the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT), for offenders placed on probation under Section 1 of this act [§ 15A-1343(b1)(2a)]."

Session Laws 1993, c. 538, s. 17, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Effect of Amendments. — Session Laws 1995, c. 446, s. 1, effective October 1, 1995, deleted "youthful" preceding "offenders" in the introductory language; substituted "and 30" for "and 25" in subdivision (1); and deleted subdivision (4) regarding the requirement that the offender not previously have served an active sentence for an offense under Article 81B of this Chapter.

Session Laws 1995, c. 507, s. 19.5(h), effective December 1, 1995, and applicable to offenses committed on or after that date, added "Class A1 misdemeanor" in subdivision (2).

§ 15A-1343.2. Special probation rules for persons sentenced under Article 81B.

(a) Applicability. — This section applies only to persons sentenced under Article 81B of this Chapter.

(b) Purposes of Probation for Community and Intermediate Punishments. — The Department of Correction shall develop a plan to handle offenders sentenced to community and intermediate punishments. The probation program designed to handle these offenders shall have the following principal purposes: to hold offenders accountable for making restitution, to ensure compliance with the court's judgment, to effectively rehabilitate offenders by directing them to specialized treatment or education programs, and to protect the public safety.

(c) Probation Caseload Goals. — It is the goal of the General Assembly that, subject to the availability of funds, caseloads for probation officers supervising persons sentenced to community punishment should not exceed an average of 90 offenders per officer, and caseloads for offenders sentenced to intermediate punishments should not exceed an average of 60 offenders per officer by July 1, 1998.

(d) Lengths of Probation Terms Under Structured Sentencing. — Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under Article 81B shall be as follows:

(1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months;
(2) For misdemeanants sentenced to intermediate punishment, not less than 12 nor more than 24 months;
(3) For felons sentenced to community punishment, not less than 12 nor more than 30 months; and
(4) For felons sentenced to intermediate punishment, not less than 18 nor more than 36 months.

If the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years, as specified in G.S. 15A-1342 and G.S. 15A-1351.

Extension. — The court may with the consent of the offender extend the original period of the probation if necessary to complete a program of restitution or to complete medical or psychiatric treatment ordered as a condition of probation. This extension may be for no more than three years, and may only be ordered in the last six months of the original period of probation.

(e) Delegation to Probation Officer in Community Punishment. — The court may delegate to the Division of Adult Probation and Parole in the Department of Correction the authority to require an offender sentenced to community punishment to:

(1) Perform up to 20 hours of community service, and pay the fee prescribed by law for this supervision;
(2) Report to the offender's probation officer on a frequency to be determined by the officer; or
(3) Submit to substance abuse monitoring or treatment.

If the Division imposes any of the above requirements, then it may subsequently reduce or remove those same requirements.

If the probation officer exercises authority delegated by the court pursuant to this subsection, the offender may file a motion with the court to review the action taken by the probation officer. The offender shall be given notice of the right to seek such a court review. The Division may exercise any authority delegated to it under this subsection only if it first determines that the offender has failed to comply with one or more of the conditions of probation imposed by the court.

(f) Delegation to Probation Officer in Intermediate Punishments. — The court may delegate to the Division of Adult Probation and

Parole in the Department of Correction the authority to require an offender sentenced to intermediate punishment to:

(1) Perform up to 50 hours of community service, and pay the fee prescribed by law for this supervision;
(2) Submit to electronic monitoring;
(3) Submit to substance abuse monitoring or treatment; or
(4) Participate in an educational or vocational skills development program.

If the Division imposes any of the above requirements, then it may subsequently reduce or remove those same requirements.

If the probation officer exercises authority delegated to him or her by the court pursuant to this subsection, the offender may file a motion with the court to review the action taken by the probation officer. The offender shall be given notice of the right to seek such a court review. The Division may exercise any authority delegated to it under this subsection only if it first determines that the offender has failed to comply with one or more of the conditions of probation imposed by the court.

(g) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 19, s. 3.

(h) Definitions. — For purposes of this section, the definitions in G.S. 15A-1340.11 apply. (1993, c. 538, s. 17.1; 1994, Ex. Sess., c. 14, s. 22; c. 19, s. 3; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 8.)

Editor's Note. — Session Laws 1993, c. 538, which enacts this section effective October 1, 1994, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 22, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

Effect of Amendments. — Session Laws 1994, Extra Session, c. 19 s. 3, which amended this section, was effective May 1, 1994, and applicable to defendants sentenced on or after that date.

§ 15A-1344. Response to violations; alteration and revocation.

(a) Authority to Alter or Revoke. — Except as provided in subsection (b), probation may be reduced, terminated, continued, extended, modified, or revoked by any judge entitled to sit in the court which imposed probation and who is resident or presiding in the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the sentence of probation was imposed, where the probationer violates probation, or where the probationer resides. Upon a finding that an offender sentenced to community punishment under Article 81B has violated one or more conditions of probation, the court's authority to modify the probation judgment includes the authority to require the offender to comply with conditions of probation that would otherwise make the sentence an intermediate punishment. The district attorney of the prosecutorial district as defined in G.S. 7A-60 in which probation was imposed must be given reasonable notice of any hearing to affect probation substantially.

(b) Limits on Jurisdiction to Alter or Revoke Unsupervised Probation. — If the sentencing judge has entered an order to limit jurisdiction to consider a sentence of unsupervised probation under G.S. 15A-1342(h), a sentence of unsupervised probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced.

(c) Procedure on Altering or Revoking Probation; Returning Probationer to District Where Sentenced. — When a judge reduces, terminates, extends, modifies, or revokes probation outside the county where the judgment was entered, the clerk must send a copy of the order and any other records to the court where probation was originally imposed. A court on its own motion may return the probationer to the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where probation was imposed or where the probationer resides for reduction, termination, continuation, extension, modification, or revocation of probation. In cases where the probation is revoked in a county other than the county of original conviction the clerk in that county must issue a commitment order and must file the order revoking probation and the commitment order, which will constitute sufficient permanent record of the proceeding in that court, and must send a certified copy of the order revoking probation, the commitment order, and all other records pertaining thereto to the county of original conviction to be filed with the original records. The clerk in the county other than the county of original conviction must issue the formal commitment to the North Carolina Department of Correction.

(d) Extension and Modification; Response to Violations. — At any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation. The probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation. The hearing may be held in the absence of the defendant, if he fails to appear for the hearing after a reasonable effort to notify him. If a convicted defendant violates a condition of probation at any time prior to the expiration or termination of the period of probation, the court, in accordance with the provisions of G.S. 15A-1345, may continue him on probation, with or without modifying the conditions, may place the defendant on special probation as provided in subsection (e), or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial; provided that probation may not be revoked solely for conviction of a Class 3 misdemeanor. The court, before activating a sentence to imprisonment established when the defendant was placed on probation, may reduce the sentence, but the reduction shall be consistent with subsection (d1) of this section. A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

(d1) Reduction of Initial Sentence. — If the court elects to reduce the sentence of imprisonment for a felony, it shall not deviate from the range of minimum durations established in Article 81B of this Chapter for the class of offense and prior record level used in determining the initial sentence. If the presumptive range is used for the initial suspended sentence, the reduced sentence shall be within the presumptive range. If the mitigated range is used for the initial suspended sentence, the reduced sentence shall be within the mitigated range. If the aggravated range is used for the initial suspended sentence, the reduced sentence shall be within the aggravated range. If the court elects to reduce the sentence for a misdemeanor, it shall not deviate from the range of durations established in Article 81B for the class of offense and prior conviction level used in determining the initial sentence.

(e) Special Probation in Response to Violation. — When a defendant has violated a condition of probation, the court may modify his probation to place him on special probation as provided in this subsection. In placing him on special probation, the court may continue or modify the conditions of his probation and in addition require that he submit to a period or periods of imprisonment, either continuous or noncontinuous, at whatever time or intervals within the period of probation the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in either the custody of the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. Except for probationary sentences for impaired driving under G.S. 20-138.1 and probationary sentences which include a period of imprisonment in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) under G.S. 15A-1343(b1)(2a), the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum sentence of imprisonment imposed for the offense, whichever is less. For probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, shall not exceed one-fourth the maximum penalty allowed by law. For probationary sentences which include a period of imprisonment in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) under G.S. 15A-1343(b1)(2a), the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, shall not exceed six months or one-half the maximum term of the suspended sentence of imprisonment, whichever is less. No confinement other than an activated suspended sentence may be required beyond the period of probation or beyond two years of the time the special probation is imposed, whichever comes first.

(e1) Criminal Contempt in Response to Violation. — If a defendant willfully violates a condition of probation, the court may hold the defendant in criminal contempt as provided in Article 1 of Chapter 5A of the General Statutes. A finding of criminal contempt by the court shall not revoke the probation. If the offender serves a sentence for contempt in a local confinement facility, the Department of Correction shall pay for the confinement at the standard rate set by the General Assembly pursuant to G.S. 148-32.1(a) regardless of whether the offender would be eligible under the terms of that subsection.

(f) Revocation after Period of Probation. — The court may revoke probation after the expiration of the period of probation if:

(1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and

(2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 11, 11A, 13A; 1979, c. 749, ss. 1-3; 1981, c. 377, s. 7; 1983, c. 536; 1987, (Reg. Sess., 1988), c. 1037, ss. 67, 68; 1993, c. 538, s. 18; 1994, Ex. Sess., c. 19, s. 2; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 9; c. 769, s. 21.7(a).)

Editor's Note. — Session Laws 1993, c. 538, s. 18, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 21.7(b) provides: "The Department of Correction shall comply with the provisions of this section [s. 21.7, which amended subsection (e1) of this section] with funds appropriated for out-of-state housing of inmates in Chapter 24 of the Session Laws of the 1994 Extra Session."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994),

c. 769, s. 43.5 is a severability clause.

Session Laws 1994, Extra Session, c. 19, s. 2, which amended this section, was effective May 1, 1994, and applicable to defendants sentenced on or after that date.

CASE NOTES

Applied in State v. Partridge, 110 N.C. App. 786, 431 S.E.2d 550 (1993).

§ 15A-1344.1. Procedure to insure payment of child support.

(a) When the court requires, as a condition of supervised or unsupervised probation, that a defendant support his children, the court may order at any time that support payments be made to the clerk of court for remittance to the party entitled to receive the payments. For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(b) After entry of such an order by the court, the clerk of court shall maintain records listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order.

(c) The parties affected by the order shall inform the clerk of court of any change of address or of other condition that may affect the administration of the order. The court may provide in the order that a defendant failing to inform the court of a change of address within reasonable period of time may be held in violation of probation.

(d) When a defendant in a non-IV-D case, as defined in G.S. 110-129, fails to make required payments of child support and is in arrears, the clerk of superior court may mail by regular mail to the last known address of the defendant a notice of delinquency which shall set out the amount of child support currently due and which shall demand immediate payment of said amount. Failure to receive the delinquency notice shall not be a defense in any probation violation hearing or other proceeding thereafter. If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or is not paid within 30 days after the defendant becomes delinquent if the clerk has elected not to send a delinquency notice, the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A or make a motion in the criminal case for income withholding pursuant to G.S. 110-136.5 or both.

When a defendant in a IV-D case, as defined in G.S. 110-129, fails to make required payments of child support and is in arrears, at the request of the IV-D obligee the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A or make a motion in the criminal case for income withholding pursuant to G.S. 110-136.5 or both. (1983, c. 567, s. 1; 1983 (Reg. Sess., 1984), c. 1100, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 949, s. 7; 1993, c. 517, s. 4.)

Editor's Note. —

Session Laws 1993, c. 517, s. 4, whichamended this section, was effective January 1, 1994, and applicable to all orders entered on or after that date.

§ 15A-1345. Arrest and hearing on probation violation.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Denial of Substitute Counsel Upheld. — Where counsel withdrew at defendant's request, presumably because defendant was not satisfied with her, the trial court's denial of substitute counsel was entirely appropriate. State v. Tucker, 111 N.C. App. 907, 433 S.E.2d 476, appeal dismissed, 335 N.C. 564, 439 S.E.2d 160 (1993), cert. dismissed, — N.C. —, 463 S.E.2d 249 (1995).

Although the court failed to comply with the provisions of subsection (c) of this section, which requires a preliminary hearing within seven working days of arrest of probationer unless the probationer waives his right to a hearing, defendant was not prejudiced by the lack of a preliminary hearing where he was arrested in Virginia, there was prima facie evidence of a probation violation, and he did not deny that he violated the conditions of his probation. State v. Clemmons, 97 N.C. App. 502, 389 S.E.2d 135, appeal dismissed and cert. denied, 327 N.C. 434, 395 S.E.2d 691 (1990).

OPINIONS OF ATTORNEY GENERAL

A probation officer may not turn a probationer over to a jail's custody based upon a special condition of probation that the probation officer had up to 30 days of incarceration if deemed necessary for minor infractions or technical violations. See opinion of the Attorney General to Thomas Thornburg, Legal Counsel, N.C. Department of Correction, 60 N.C.A.G. 110 (1992).

§ 15A-1347. Appeal from revocation of probation or imposition of special probation upon violation.

CASE NOTES

No Right to Appeal Voluntary Election to Serve Sentence. — Where the trial court activated defendant's sentence upon his voluntary election to serve the sentence in lieu of the remainder of his probation and not as a result of a finding of a violation of probation, defendant had no right to appeal from his activated sentence. State v. Ikard, 117 N.C. App. 460, 450 S.E.2d 927 (1994).

Cited in State v. Gravette, 327 N.C. 114, 393 S.E.2d 856 (1990).

ARTICLE 83.

Imprisonment.

§ 15A-1351. Sentence of imprisonment; incidents; special probation.

(a) The judge may sentence to special probation a defendant convicted of a criminal offense other than impaired driving under G.S. 20-138.1, if based on the defendant's prior record or conviction level as found pursuant to Article 81B of this Chapter, an intermediate punishment is authorized for the class of offense of which the defendant has been convicted. A defendant convicted of impaired driving under G.S. 20-138.1 may also be sentenced to special probation. Under a sentence of special probation, the court may suspend the term of imprisonment and place the defendant on probation as provided in Article 82, Probation, and in addition require that the defendant submit to a period or periods of imprisonment in the custody of the Department of Correction or a designated local confinement or treatment facility at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court determines. In addition to any other conditions of probation which the court may impose, the court shall impose, when imposing a period or periods of imprisonment as a condition of special probation, the condition that the defendant obey the Rules and Regulations of the Department of Correction governing conduct of inmates, and this condition shall apply to the defendant whether or not the court imposes it as a part of the written order. If imprisonment is for continuous periods, the confinement may be in the custody of either the Department of Correction or a local confinement facility. Noncontinuous periods of imprisonment under special probation may only be served in a designated local confinement or treatment facility. Except for probationary sentences of impaired driving under G.S. 20-138.1 and probationary sentences which include a period of imprisonment in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) under G.S. 15A-1343(b1)(2a), the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum sentence of imprisonment imposed for the offense, whichever is less, and no confinement other than an activated suspended sentence may be required beyond two years of conviction. For probationary sentences for impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, shall not exceed one-fourth the maximum penalty allowed by law. For probationary sentences which include a period of imprisonment in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) under G.S. 15A-1343(b1)(2a), the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, shall not exceed six months or one-half of the maximum term of the suspended sentence, whichever is less. In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to either the suspended sentence or to the imprisonment required for special probation. The original period of probation, including the period of imprisonment required for special probation, shall be as specified in G.S. 15A-1343.2(d), but may not exceed a maximum of five years, except as provided by G.S. 15A-1342(a). The court may revoke, modify, or terminate special probation as otherwise provided for probationary sentences.

(b) Sentencing of a person convicted of a felony or of a misdemeanor other than impaired driving under G.S. 20-138.1 that occurred on or after the effective date of Article 81B is subject to that Article. For persons convicted of impaired driving under G.S. 20-138.1, a sentence to imprisonment must impose a maximum term and may impose a minimum term. The impaired driving judgment may state the minimum term or may state that a term constitutes both the minimum and maximum terms. If the impaired driving judgment states no minimum term, the defendant becomes eligible for parole in accordance with G.S. 15A-1371(a).

(c) Repealed by Session Laws 1979, c. 749, s. 7.

(d), (e). Repealed by Session Laws 1993, c. 538, s. 19, effective October 1, 1994.

(f) Work Release. — When sentencing a person convicted of a felony, the sentencing court may recommend that the sentenced offender be granted work release as authorized in G.S. 148-33.1. When sentencing a person convicted of a misdemeanor, the sentencing court may recommend or, with the consent of the person sentenced, order that the sentenced offender be granted work release as authorized in G.S. 148-33.1.

(g) Credit. — Credit towards a sentence to imprisonment is as provided in Article 19A of Chapter 15 of the General Statutes.

(h) Substance Abuse Recommendation. — The sentencing court may recommend that the sentenced offender be assigned to the Substance Abuse Treatment Unit for treatment of alcoholism or substance abuse during his imprisonment. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 15-17; 1979, c. 749, ss. 5-7; c. 760, s. 4; 1985 (Reg. Sess., 1986), c. 1014, s. 201(a); 1987, c. 738, s. 111(e); 1993, c. 84, s. 2; c. 538, s. 19; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, ss. 7, 10.)

Editor's Note. —

Session Laws 1993, c. 538, s. 19, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993, c. 84, s. 2, which amended this section, was effective March 1, 1994, and applicable to persons placed on probation on or after that date.

CASE NOTES

This section did not govern credit for time served where a trial court revoked probation and activated a suspended sentence. State v. Farris, 336 N.C. 552, 444 S.E.2d 182 (1994).

Defendant was entitled to credit for time he was incarcerated as a condition of special probation when his probation was revoked and the suspended sentence activated. State v. Farris, 336 N.C. 552, 444 S.E.2d 182 (1994).

Cited in State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803 (1993).

§ 15A-1352. Commitment to Department of Correction or local confinement facility.

(a) A person sentenced to imprisonment for a misdemeanor under this Article or for nonpayment of a fine under Article 84 of this Chapter shall be committed for the term designated by the court to the custody of the Department of Correction or to a local confinement facility. If the sentence imposed for a misdemeanor is for a period of 90 days or less, the commitment must be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b).

If a person is sentenced to imprisonment for a misdemeanor under this Article or for nonpayment of a fine under Article 84 of this Chapter, the sentencing judge shall make a finding of fact as to whether the person would be suitable for placement in a county satellite jail/work release unit operated pursuant to G.S. 153A-230.3. If the sentencing judge makes a finding of fact that the person would be suitable for placement in a county satellite jail/work release unit and the person meets the requirements listed in G.S. 153A-230.3(a)(1), then the custodian of the local confinement facility may transfer the misdemeanant to a county satellite jail/work release unit.

(b) A person sentenced to imprisonment for a felony under this Article shall be committed for the term designated by the court to the custody of the Department of Correction; except that, upon request of the sheriff or the board of commissioners of a county, the presiding judge may, in his discretion, sentence the person to a local confinement facility in that county.

(c) A person sentenced to imprisonment for nonpayment of a fine under Article 84, Fines, shall be committed for the term designated by the court:

(1) To the custody of the Department of Correction if the person was fined for conviction of a felony;

(2) To the custody of the Department of Correction or to a local confinement facility if the person was fined for conviction of a misdemeanor, provided that if the sentence imposed is for a period of 90 days or less, the commitment shall be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b).

(d) Notwithstanding any other provision of law, when the sentencing court, with the consent of the person sentenced, orders that a person convicted of a misdemeanor be granted work release, the court may commit the person to a specific prison facility or local confinement facility or satellite jail/work release unit within the county of the sentencing court in order to facilitate the work release arrangement. When appropriate to facilitate the work release arrangement, the sentencing court may, with the consent of the sheriff or board of commissioners, commit the person to a specific local confinement facility or satellite jail/work release unit in another county, or, with the consent of the Department of Correction, commit the person to a specific prison facility in another county. The Department of Correction may transfer a prisoner committed to a specific prison facility to a different facility when necessary to alleviate overcrowding or for other administrative purposes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 18; 1979, c. 456, s. 1; c. 787, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1014, s. 201(b); 1987, c. 207, s. 3;

1989, c. 761, s. 6; 1991, Ex. Sess., c. 486, s. 1; c. 8, s. 1; 1993, c. 538, s. 37; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. —
Session Laws 1991, Ex. Sess., c. 8, s. 1, effective January 24, 1992, amended Session Laws 1991, c. 486, s. 1, by substituting "G.S. 15A-1352(d)" for "G.S. 15A-1353(d)" in the introductory language. Therefore, the amendment of this section by Session Laws 1991, c. 486 has been effectuated in the text above.

Session Laws 1987, c. 207, s. 4 provides that the act shall not be construed to obligate the General Assembly to make any appropriation to implement its provisions, not shall it be construed to obligate the State to make any grant for which no funds have been appropriated by the General Assembly.

Session Laws 1993, c. 538, s. 37, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

§ 15A-1353. Order of commitment when imprisonment imposed; release pending appeal.

CASE NOTES

Cited in Allen v. Lowder, 875 F.2d 82 (4th Cir. 1989).

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

(a) Authority of Court. — When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(b) Effect of Consecutive Terms. — In determining the effect of consecutive sentences imposed under authority of this Article and the manner in which they will be served, the Department of Correction must treat the defendant as though he has been committed for a single term with the following incidents:

(1) The maximum prison sentence consists of the total of the maximum terms of the consecutive sentences, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies; and

(2) The minimum term consists of the total of the minimum terms of the consecutive sentences. (1977, c. 711, s. 1; 1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 40; 1985, c. 21; 1994, Ex. Sess., c. 14, s. 23.)

Editor's Note. — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 23, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

CASE NOTES

Reference in subsection (a) to individual who, at time of sentencing, is "already" subject to an undischarged term of imprisonment does not mean any term of imprisonment to which defendant might become subject in the future. State v. Campbell, 90 N.C. App. 761, 370 S.E.2d 79, appeal dismissed, 323 N.C. 367, 373 S.E.2d 550 (1988).

Imposition of Consecutive Sentences Upheld, etc. —

The trial court had the discretion to impose consecutive sentences for multiple offenses where the defendant was convicted of three counts of first-degree murder, and the jury recommended sentences of life imprisonment after finding and weighing the mitigating circumstances and aggravating circumstances. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

Cited in State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989); State v. Jacob, 113 N.C. App. 605, 439 S.E.2d 812 (1994).

OPINIONS OF ATTORNEY GENERAL

Aggregation Not Permitted. — The post release supervision and parole commission cannot aggregate, pursuant to subsection (b), the sentences imposed for armed robberies committed prior to October 1, 1994. See opinion of Attorney General to Sam F. Boyd, Executive Director Post-Release Supervision and Parole Commission, — N.C.A.G. — (Aug. 1, 1995).

Aggregation Appropriate. — If an inmate is sentenced to consecutive armed robbery sentences at the same sentencing hearing, his sentence should be aggregated pursuant to subsection (b). See opinion of Attorney General to Sam F. Boyd, Executive Director Post-Release Supervision and Parole Commission, — N.C.A.G. — (Aug. 1, 1995).

§ 15A-1355. Calculation of terms of imprisonment.

(a) Commencement of Sentence. — The commencement date of a sentence of imprisonment under authority of this Article is as provided in G.S. 15A-1353(a), except when the sentence is a consecutive sentence. When it is a consecutive sentence, it commences to run when the State has custody of the defendant following completion of the prior sentence.

(b) Repealed by Session Laws 1977, 2nd Sess., c. 1147, s. 19, effective July 1, 1978.

(c) Earned Time; Credit for Good Behavior for Impaired Drivers. — Persons convicted of felonies or misdemeanors under Article 81B of this Chapter may, consistent with rules of the Department of Correction, earn credit which may be used to reduce their maximum terms of imprisonment as provided in G.S. 15A-1340.13(d) for felony sentences and in G.S. 15A-1340.20(d) for misdemeanor sentences.

For sentences of imprisonment imposed for convictions of impaired driving under G.S. 20-138.1, the Department of Correction may give credit toward service of the maximum term and any minimum term of imprisonment and toward eligibility for parole for allowances of time as provided in rules and regulations made under G.S. 148-11 and 148-13. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 19; 1979, c. 749, s. 8; c. 760, s. 4; 1981, c. 571; c. 1127, s. 84; 1983, c. 560, § 1; 1993, c. 538, s. 20; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. — Session Laws 1993, c. 538, s. 20, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

ARTICLE 84.

Fines.

§§ 15A-1366, 15A-1367: Reserved for future codification purposes.

ARTICLE 84A.

Post-Release Supervision.

§ 15A-1368. Definitions and administration.

(a) The following words have the listed meaning in this Article:

(1) Post-release supervision or supervision. — The time for which a sentenced prisoner is released from prison before the termination of his maximum prison term, controlled by the rules and conditions of this Article. Purposes of post-release supervision include all or any of the following: to monitor and control the prisoner in the community, to assist the prisoner in reintegrating into society, to collect restitution and other court indebtedness from the prisoner, and to continue the prisoner's treatment or education.

(2) Supervisee. — A person released from incarceration and in the custody of the Department of Correction and Post-Release Supervision and Parole Commission on post-release supervision.

(3) Commission. — The Post-Release Supervision and Parole Commission, whose general authority is described in G.S. 143B-266.

(4) Minimum imposed term. — The minimum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive imprisonment terms, the minimum imposed term, for purposes of this Article, is the sum of all minimum terms imposed in the court judgment.

(5) Maximum imposed term. — The maximum term of imprisonment imposed on an individual prisoner by a court judgment, as described in G.S. 15A-1340.13(c). When a prisoner is serving consecutive prison terms, the maximum imposed term, for purposes of this Article, is the sum of all maximum terms imposed in the court judgment, less nine months for each of the second and subsequent sentences imposed for Class B through Class E felonies.

(b) Administration. — The Post-Release Supervision and Parole Commission, as authorized in Chapter 143 of the General Statutes, shall administer post-release supervision as provided in this Article. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 14, ss. 24, 25; c. 24, s. 14(b).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been § 15A-1370.1.

Session Laws 1993, c. 538, which enacts this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, ss. 24, 25, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

§ 15A-1368.1. Applicability of Article 84A.

This Article applies to all felons in Class B1 through Class E sentenced to an active punishment under Article 81B of this Chapter, but does not apply to felons in Class B1 sentenced to life imprisonment without parole. Prisoners subject to Articles 85 and 85A of this Chapter are excluded from this Article's coverage. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 14, s. 26; c. 22, s. 8; c. 24, s. 14(b).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been § 15A-1370.2.

Session Laws 1993, c. 538, which enacts this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, s. 8, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after the effective date of this Part. Prosecution for offenses occurring before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 14, s. 26, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date.

§ 15A-1368.2. Post-release supervision eligibility and procedure.

(a) A prisoner to whom this Article applies shall be released from prison for post-release supervision on the date equivalent to his maximum imposed prison term less nine months, less any earned time awarded by the Department of Correction or the custodian of a local confinement facility under G.S. 15A-1340.13(d). If a prisoner has not been awarded any earned time, the prisoner shall be released for post-release supervision on the date equivalent to his maximum prison term less nine months.

(b) A prisoner shall not refuse post-release supervision.

(c) A supervisee's period of post-release supervision shall be for a period of nine months, unless the offense is an offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes. For offenses subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the period of post-release supervision is five years. The conditions of post-release supervision are as authorized in G.S. 15A-1368.5.

(d) A supervisee's period of post-release supervision may be reduced while the supervisee is under supervision by earned time awarded by the Department of Correction, pursuant to rules adopted in accordance with law. A supervisee is eligible to receive earned time credit toward the period of supervision for compliance with reintegrative conditions described in G.S. 15A-1368.5.

(e) The Commission shall choose the level of supervision for supervisees. It may place a supervisee on any available level of supervision, including electronic monitoring, intensive supervision, or regular supervision.

(f) When a supervisee completes the period of post-release supervision, the sentence or sentences from which the supervisee was placed on post-release supervision are terminated. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 4; 1996, 2nd Ex. Sess., c. 18, s. 20.14(a).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been § 15A-1370.3.

Session Laws 1993, c. 538, which enacts this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective December 1, 1996, in subsection (c), substituted "nine months, unless the offense is an offense for which registration is required pursuant to Article 27A of Chapter 14 of the General Statutes" for "six months," and added the second sentence.

§ 15A-1368.3. Incidents of post-release supervision.

(a) Conditionality. — Post-release supervision is conditional and subject to revocation.

(b) Modification. — The Commission may for good cause shown modify the conditions of post-release supervision at any time before the termination of the supervision period.

(c) Effect of Violation. — If the supervisee violates a condition, described in G.S. 15A-1368.4, at any time before the termination of the supervision period, the Commission may continue the supervisee on the existing supervision, with or without modifying the conditions, or if continuation or modification is not appropriate, may revoke post-release supervision as provided in G.S. 15A-1368.6 and reimprison the supervisee for a term consistent with the following requirements:

(1) The supervisee will be returned to prison up to the time remaining on his maximum imposed term.

(2) The supervisee shall not receive any credit for days on post-release supervision against the maximum term of imprisonment imposed by the court under G.S. 15A-1340.13.

(3) Pursuant to Article 19A of Chapter 15, the Department of Correction shall award a prisoner credit against any term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1368.6.

(4) The prisoner is eligible to receive earned time credit against the maximum prison term as provided in G.S. 15A-1340.13(d) for time served in prison after the revocation.

(d) Re-Release After Revocation of Post-Release Supervision. — A prisoner who has been reimprisoned prior to completing a post-release supervision period may again be released on post-release supervision by the Commission subject to the provisions which govern initial release.

(e) Timing of Revocation. — The Commission may revoke post-release supervision for violation of a condition during the period of supervision. The Commission may also revoke post-release supervision following a period of supervision if:

(1) Before the expiration of the period of post-release supervision, the Commission has recorded its intent to conduct a revocation hearing; and

(2) The Commission finds that every reasonable effort has been made to notify the supervisee and conduct the hearing earlier. Prima facie evidence of reasonable effort to notify is the issuance of a temporary or conditional revocation order, as provided in G.S. 15A-1376, that goes unserved. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 14, s. 27; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 5.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been § 15A-1370.4.

Session Laws 1993, c. 538, which enacts this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 27, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

§ 15A-1368.4. Conditions of post-release supervision.

(a) In General. — Conditions of post-release supervision may be reintegrative in nature or designed to control the supervisee's behavior and to enforce compliance with law or judicial order. A supervisee may have his supervision period revoked for any violation of a controlling condition or for repeated violation of a reintegrative condition. Compliance with reintegrative conditions may entitle a supervisee to earned time credits as described in G.S. 15A-1368.2(d).

(b) Required Condition. — The Commission shall provide as an express condition of every release that the supervisee not commit another crime during the period for which the supervisee remains subject to revocation. A supervisee's failure to comply with this controlling condition is a supervision violation for which the supervisee may face revocation as provided in G.S. 15A-1368.3.

(b1) Additional Required Conditions for Sex Offenders and Persons Convicted of Offenses Involving Physical, Mental, or Sexual Abuse of a Minor. — In addition to the required condition set forth in subsection (b) of this section, for a supervisee who has been convicted of an offense which is a reportable conviction as defined in G.S. 14-208.6(4), or which involves the physical, mental, or sexual abuse of a minor, controlling conditions, violations of which may result in revocation of post-release supervision, are:

(1) Register as required by G.S. 14-208.7 if the offense is a reportable conviction as defined by G.S. 14-208.6(4).

(2) Participate in such evaluation and treatment as is necessary to complete a prescribed course of psychiatric, psychological, or other rehabilitative treatment as ordered by the Commission.

(3) Not communicate with, be in the presence of, or found in or on the premises of the victim of the offense.

(4) Not reside in a household with any minor child if the offense is one in which there is evidence of sexual abuse of a minor.

(5) Not reside in a household with any minor child if the offense is one in which there is evidence of physical or mental abuse of a minor, unless a court of competent jurisdiction expressly finds that it is unlikely that the defendant's harmful or abusive conduct will recur and that it would be in the child's best interest to allow the supervisee to reside in the same household with a minor child.

(c) Discretionary Conditions. — The Commission may in its discretion impose conditions on a supervisee it believes reasonably necessary to ensure that the supervisee will lead a law-abiding life or to assist the supervisee to do so.

(d) Reintegrative Conditions. — Appropriate reintegrative conditions, for which a supervisee may receive earned time credits against the length of the supervision period, and repeated violation that may result in revocation of post-release supervision, are:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip the supervisee for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on post-release supervision.

(4) Support the supervisee's dependents and meet other family responsibilities.

(5) In the case of a supervisee who attended a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(6) Satisfy other conditions reasonably related to reintegration into society.

(e) Controlling Conditions. — Appropriate controlling conditions, violation of which may result in revocation of post-release supervision, are:

(1) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the supervisee by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.

(2) Comply with a court order to pay the costs of reintegrative treatment for a minor and a minor's parents or custodians where the offense involved evidence of physical, mental, or sexual abuse of a minor.

(3) Comply with a court order to pay court costs and costs for appointed counsel or public defender in the case for which the supervisee was convicted.

(4) Not possess a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or a post-release supervision officer.

(5) Report to a post-release supervision officer at reasonable times and in a reasonable manner, as directed by the Commission or a post-release supervision officer.

(6) Permit a post-release supervision officer to visit at reasonable times at the supervisee's home or elsewhere.

(7) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the post-release supervision officer.

(8) Answer all reasonable inquiries by the post-release supervision officer and obtain prior approval from the post-

release supervision officer for any change in address or employment.

(9) Promptly notify the post-release supervision officer of any change in address or employment.

(10) Submit at reasonable times to searches of the supervisee's person by a post-release supervision officer for purposes reasonably related to the post-release supervision. The Commission shall not require as a condition of post-release supervision that the supervisee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the supervisee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(12) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the supervisee in connection with any judgment rendered by the court.

(f) Required Supervision Fee. — The Commission shall require as a condition of post-release supervision that the supervisee pay a supervision fee of twenty dollars ($20.00) per month. The Commission may exempt a supervisee from this condition only if it finds that requiring payment of the fee is an undue economic burden. The fee shall be paid to the clerk of superior court of the county in which the supervisee was convicted. The clerk shall transmit any money collected pursuant to this subsection to the State to be deposited in the State's General Fund. In no event shall a supervisee be required to pay more than one supervision fee per month. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.14(b).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been § 15A-1370.5.

Session Laws 1993, c. 538, which enacts this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective December 1, 1996, added subsection (b1).

§ 15A-1368.5. Commencement of post-release supervision; multiple sentences.

A period of post-release supervision begins on the day the prisoner is released from imprisonment. Periods of post-release supervision run concurrently with any federal or State prison, jail, probation, or parole terms to which the prisoner is subject during the period, only if the jurisdiction which sentenced the prisoner to prison, jail, probation, or parole permits concurrent crediting of supervision time. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been § 15A-1370.6.

Session Laws 1993, c. 538, which enacts this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

§ 15A-1368.6. Arrest and hearing on post-release supervision violation.

(a) Arrest for Violation of Post-Release Supervision. — A supervisee is subject to arrest by a law enforcement officer or a post-release supervision officer for violation of conditions of post-release supervision only upon issuance of an order of temporary or conditional revocation of post-release supervision by the Commission. However, a post-release supervision revocation hearing under subsection (e) of this section may be held without first arresting the supervisee.

(b) When and Where Preliminary Hearing on Post-Release Supervision Violation Required. — Unless the hearing required by subsection (e) of this section is first held or a continuance is requested by the supervisee, a preliminary hearing on supervision violation shall be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a supervisee to determine whether there is probable cause to believe that the supervisee violated a condition of post-release supervision. Otherwise, the supervisee shall be released seven working days after arrest to continue on supervision pending a hearing. If the supervisee is not within the State, the preliminary hearing is as prescribed by G.S. 148-65.1A.

(c) Officers to Conduct Preliminary Hearing. — The preliminary hearing on post-release supervision violation shall be conducted by a judicial official, or by a hearing officer designated by the Commission. A person employed by the Department of Correction shall not serve as a hearing officer at a hearing provided by this section unless that person is a member of the Commission, or is employed solely as a hearing officer.

(d) Procedure for Preliminary Hearing. — The Department of Correction shall give the supervisee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the supervisee may appear and speak in the supervisee's own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the supervisee violated conditions of supervision, the hearing officer shall summarize the reasons for the determination and the evidence relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the supervisee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e) of this section.

(e) Revocation Hearing. — Before finally revoking post-release supervision, the Commission shall, unless the supervisee waived the hearing or the time limit, provide a hearing within 45 days of the supervisee's reconfinement to determine whether to revoke supervision finally. The Commission shall adopt rules governing the hearing and shall file and publish them as provided in Article 5 of Chapter 150B of the General Statutes. (1993, c. 538, s. 20.1; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.15(b).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1993, c. 538, s. 20.1 having been § 15A-1370.7.

Session Laws 1993, c. 538, which enacts this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective August 3, 1996, deleted "or the supervisee waives the hearing" preceding "or a continuance is requested" in subsection (b).

§§ 15A-1369, 15A-1370: Reserved for future codification purposes.

ARTICLE 85.

Parole.

§ 15A-1370.1. Applicability of Article 85.

This Article is applicable to all prisoners serving sentences of imprisonment for convictions of impaired driving under G.S. 20-138.1. This Article does not apply to a prisoner serving a sentence of life imprisonment without parole. A prisoner serving a sentence of life imprisonment without parole shall not be eligible for parole at any time. (1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 41; 1981, c. 662, s. 3; 1993, c. 538, s. 21; 1994, Ex. Sess., c. 21, s. 2; c. 22, ss. 33, 34; c. 24, s. 14(b).)

Editor's Note. —

Session Laws 1993, c. 538, s. 21, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 21, s. 2, which amended this section, in s. 8 provides: "This act becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after that date. Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal, expiration, or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 22, s. 37, provides: "Section 33 of this act [which amended this section] becomes effective May 1, 1994, and expires on the date that Chapter 538 of the 1993 Session Laws beecomes effective, but prosecution for, or sentences based on, offenses occurring before that date are not abated or affected by the expiration of that section." It further provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this Part are not abated or affected by the repeal or amendment in this Part of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this Part remain applicable to those prosecutions or sentences."

The section is set out above as amended by Session Laws 1994, Extra Session, c. 21, s. 2, at the direction of the Revisor of Statutes.

§ 15A-1371. Parole eligibility, consideration, and refusal.

(a) Eligibility. — Unless his sentence includes a minimum sentence, a prisoner serving a term of imprisonment for a conviction of impaired driving under G.S. 20-138.1 other than one included in a sentence of special probation imposed under authority of this Subchapter is eligible for release on parole at any time. A prisoner whose sentence includes a minimum term of imprisonment imposed under authority of this Subchapter is eligible for release on parole only upon completion of the service of that minimum term or one fifth of the maximum penalty allowed by law for the offense for which the prisoner is sentenced, whichever is less, less any credit allowed under G.S. 15A-1355(c) and Article 19A of Chapter 15 of the General Statutes.

(a1) Repealed by Session Laws 1994, Ex. Sess., c. 21, s. 3, effective October 1, 1994.

(b)(1), (2) Repealed by Session Laws 1993, c. 538, s. 22, effective October 1, 1994.

(3) Whenever the Post-Release Supervision and Parole Commission will be considering for parole a prisoner serving a sentence of life imprisonment the Commission must notify, at least 30 days in advance of considering the parole, by first class mail at the last known address:

a. The prisoner;
b. The district attorney of the district where the prisoner was convicted;
c. The head of the law enforcement agency that arrested the prisoner, if the head of the agency has requested in writing that he be notified;
d. Any of the victim's immediate family members who have requested in writing to be notified; and
e. Repealed by Session Laws 1993, c. 538, s. 22, effective October 1, 1994.

f. As many newspapers of general circulation and other media in the county where the defendant was convicted and if different, in the county where the prisoner was charged, as reasonable.

The Post-Release Supervision and Parole Commission must consider any information provided by any such parties before consideration of parole. The Commission must also give the district attorney, the head of the law enforcement agency who has requested in writing to be notified, the victim, any member of the victim's immediate family who has requested to be notified, and as many newspapers of general circulation and other media in the county or counties designated in sub-subdivision f. of this section as reasonable, written notice of its decision within 10 days of that decision. The Parole Commission shall not, however, include the name of any victim in its notification to the newspapers and other media.

(c) Repealed by Session Laws 1993, c. 538, s. 22, effective October 1, 1994.

(d) Criteria. — The Post-Release Supervision and Parole Commission may refuse to release on parole a prisoner it is considering for parole if it believes:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or
(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or
(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or
(4) There is a substantial risk that he would engage in further criminal conduct.

(e) Refusal of Parole. — A prisoner who has been granted parole may elect to refuse parole and to serve the remainder of his term of imprisonment.

(f) Repealed by Session Laws 1993, c. 538, s. 22, effective October 1, 1994.

(g) Notwithstanding the provisions of subsection (a), a prisoner serving a sentence of not less than 30 days nor as great as 18 months for impaired driving may be released on parole when he completes service of one-third of his maximum sentence unless the Post-Release Supervision and Parole Commission finds in writing that:

(1) There is a substantial risk that he will not conform to reasonable conditions of parole; or
(2) His release at that time would unduly depreciate the seriousness of his crime or promote disrespect for law; or
(3) His continued correctional treatment, medical care, or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date; or
(4) There is a substantial risk that he would engage in further criminal conduct.

If a prisoner is released on parole by operation of this subsection, the term of parole is the unserved portion of the sentence to imprisonment, and the conditions of parole, unless otherwise specified by the Post-Release Supervision and Parole Commission, are those authorized in G.S. 15A-1374(b)(4) through (10).

In order that the Post-Release Supervision and Parole Commission may have an adequate opportunity to make a determination whether parole under this section should be denied, no prisoner eligible for parole under this subsection shall be released from confinement prior to the fifth full working day after he shall have been placed in the custody of the Secretary of Correction or the custodian of a local confinement facility.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, prisoners serving sentences for impaired driving shall be eligible for community service parole, in the discretion of the Post-Release Supervision and Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole community service in an amount and over a period of time to be determined by the Post-Release Supervision and Parole Commission. However, the total amount of community service shall not exceed an amount equal to 32 hours for each month of active service remaining in his minimum sentence. The Post-Release Supervision and Parole Commission may grant early parole under this section without requiring the performance of community service if it determines that such performance is inappropriate to a particular case.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

(1) Who is serving an active sentence the term of which exceeds six months; and
(2) Who, in the opinion of the Post-Release Supervision and Parole Commission, is unlikely to engage in further criminal conduct; and
(3) Who agrees to complete service of his sentence as herein specified; and
(4) Who has served one-half of his minimum sentence.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of one hundred dollars ($100.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county in which the parolee is released. The fee must be paid in full within two weeks unless the Post-Release Supervision and Parole Commission, upon a showing of hardship by the person, allows him additional time to pay the fee. The parolee may not be required to pay the fee before he begins the community service unless the Post-Release Supervision and Parole Commission specifically orders that he do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this section may be paid as prescribed by the supervising parole officer.

(j) The Post-Release Supervision and Parole Commission may terminate a prisoner's community service parole before the expiration of the term of imprisonment where doing so will not endanger the public, unduly depreciate the seriousness of the crime, or promote disrespect for the law. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5; 1987, c. 47; c. 783, s. 7; 1989, c. 1, ss. 3, 4; 1991, c. 217, s. 3; c. 288, s. 2; 1993, c. 538, s. 22; 1994, Ex. Sess., c. 21, s. 3; c. 24, s. 14(b); c. 25, ss. 1, 2.)

Editor's Note. —

Session Laws 1991, c. 217, s. 5 provides: "Sections 3 and 4 of this act shall apply to prisoners currently serving active sentences or currently on parole."

Session Laws 1993, c. 538, s. 22, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 21, s. 3, which amended this section, in s. 8 provides: "This act becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after that date. Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal, expiration, or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 25, provides in s. 3: "Section 1 of this act [which amended subdivision (b)(3)] becomes effective 45 days after ratification and expires upon the effective date of Section 22 of Chapter 538 of the 1993 Session Laws [October 1, 1994], but remains effective for offenses committed prior to the effective date of Section 22 of Chapter 538 of the 1993 Session Laws [October 1, 1994], as provided by Section 56 of that act." The act was ratified on March 26, 1994.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Due Process Applicable. — protected by the due process clause, since it creates a presumption that parole release will be granted if there are no findings that fall within the stated exceptions. Harwood v. Johnson, 326 N.C. 231, 388 S.E.2d 439, rehearing denied, 326 N.C. 488, 389 S.E.2d 810 (1990).

Action Against Parole Commission for Disregard of Mandate of Subsection (f). — Complaint alleging that under subsection (f) of this section plaintiff should have been released on parole on June 14, 1986, but that he was actually not released on parole until some thirty days after the court ordered his immediate release and more than five months after that date and that the delay in releasing plaintiff on parole was caused by the actions of defendants acting in accord with a practice or policy of the Parole Commission to disregard the mandate of subsection (f) was sufficient to entitle plaintiff to pursue relief pursuant to 42 U.S.C. § 1983 as to individual members of the Parole Commission. Harwood v. Johnson, 326 N.C. 231, 388 S.E.2d 439, rehearing denied, 326 N.C.

488, 389 S.E.2d 810 (1990).

Allegations that members of the Parole Commission did not adhere to the mandate of subsection (f) of this section, and that even after the court ordered plaintiff's immediate release he was not released for approximately another month, were sufficient to show an unlawful and total restraint of plaintiff's liberty against his will by the members of the Parole Commission, and if proved, to entitle plaintiff to monetary relief for false imprisonment. Harwood v. Johnson, 326 N.C. 231, 388 S.E.2d 439, rehearing denied, 326 N.C. 488, 389 S.E.2d 810 (1990).

Instruction on Parole Ineligibility in Capital Case. — Due process did not require that the sentencing jury be informed that the defendant charged with first degree murder was parole ineligible, where the jury did not inquire about defendant's parole eligibility and the prosecutors did not argue future dangerousness to the jury; arguing the aggravating circumstances did not amount to arguing future dangerousness. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, — U.S. —, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Cited in State v. Smith, 323 N.C. 359, 372 S.E.2d 557 (1988); Harwood v. Johnson, 92 N.C. App. 306, 374 S.E.2d 401 (1988); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994); State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994).

§ 15A-1372. Length and effect of parole term.

(a) Term of Parole. — The term of parole for any person released from imprisonment may be no greater than one year.

(b) Repealed by Session Laws 1993, c. 538, s. 23, effective October 1, 1994.

(c) Termination of Sentence. — When a parolee completes his period of parole, the sentence or sentences from which he was paroled are terminated.

(d) Repealed by Session Laws 1993, c. 538, s. 23, effective October 1, 1994. (1977, c. 711, s. 1; 1981, c. 642; 1989, c. 1, s. 8; 1989 (Reg. Sess., 1990), c. 1031, s. 3; 1991, c. 217, s. 1; 1993, c. 538, s. 23; 1994, Ex. Sess., c. 21, s. 4; c. 24, s. 14(b).)

Editor's Note. — Session Laws 1991, c. 217, s. 5 provides: "Section 1 of this act shall apply to prisoners currently serving active sentences."

Session Laws 1993, c. 538, s. 23, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 21, s. 4, which amended this section, in s. 8 provides: "This act becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after that date. Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal, expiration, or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

§ 15A-1373. Incidents of parole.

(a) Conditionality of Parole. — Unless terminated sooner as provided in subsection (b), parole remains conditional and subject to revocation.

(b) Early Termination. — The Post-Release Supervision and Parole Commission may terminate a period of parole and discharge the parolee at any time after the expiration of one year of successful parole if warranted by the conduct of the parolee and the ends of justice.

(c) Modification of Conditions. — The Post-Release Supervision and Parole Commission may for good cause shown modify the conditions of parole at any time prior to the expiration or termination of the period for which the parole remains conditional.

(d) Effect of Violation. — If the parolee violates a condition at any time prior to the expiration or termination of the period, the Commission may continue him on the existing parole, with or without modifying the conditions, or, if continuation or modification is not appropriate, may revoke the parole as provided in G.S. 15A-1376 and reimprison the parolee for a term consistent with the following requirements:

(1) The time the parolee was at liberty on parole and in compliance with all terms and conditions of that parole shall be credited on a day-for-day basis against the maximum term of imprisonment imposed by the court under G.S. 15A-1351, except that the parolee shall receive no credit for the last six months of his parole.

(2) The prisoner must be given credit against the term of reimprisonment for all time spent in custody as a result of revocation proceedings under G.S. 15A-1376.

(e) Re-parole. — A prisoner who has been reimprisoned following parole may be re-paroled by the Post-Release Supervision and Parole Commission subject to the provisions which govern initial parole. In the event that a defendant serves the final six months of his maximum imprisonment as a result of being recommitted for violation of parole, he may not be required to serve a further period on parole.

(f) Timing of Revocation. — The Post-Release Supervision and Parole Commission may revoke parole for violation of a condition during the period of parole. The Commission also may revoke following the period of parole if:

(1) Before the expiration of the period of parole, the Commission has recorded its intent to conduct a revocation hearing, and

(2) The Commission finds that every reasonable effort has been made to notify the parolee and conduct the hearing earlier. (1977, c. 711, s. 1; 1979, c. 927; 1991, c. 217, s. 2; 1993, c. 538, s. 38; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. — Session Laws 1993, c. 538, s. 38, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1991, c. 217, s. 2, which amended this section, became effective June 5, 1991, and applied to parole violations committed on or after that date.

§ 15A-1374. Conditions of parole.

(a) In General. — The Post-Release Supervision and Parole Commission may in its discretion impose conditions of parole it believes reasonably necessary to insure that the parolee will lead a law-abiding life or to assist him to do so. The Commission must provide as an express condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation. When the Commission releases a person on parole, it must give him a written statement of the conditions on which he is being released.

(b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

(1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.

(2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.

(3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.

(4) Support his dependents and meet other family responsibilities.

(5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.

(6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.

(7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.

(8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.

(9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.

(10) Promptly notify the parole officer of any change in address or employment.

(11) Submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful. Whenever the search consists of testing for the presence of illegal drugs, the parolee may also be required to reimburse the Department of Correction for the actual cost of drug testing and drug screening, if the results are positive.

(11a) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.

(11b) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the parolee in connection with any judgment rendered by the court.

(11c) In the case of a parolee who was attending a basic skills program during incarceration, continue attending a basic skills program in pursuit of a General Education Development Degree or adult high school diploma.

(12) Satisfy other conditions reasonably related to his rehabilitation.

(c) Supervision Fee. — The Commission must require as a condition of parole that the parolee pay a supervision fee of twenty dollars ($20.00) per month. The Commission may exempt a parolee from this condition of parole only if it finds that requiring him to pay the fee will constitute an undue economic burden. The fee must be paid to the clerk of superior court of the county in which the parolee was convicted. The clerk must transmit any money collected pursuant to this subsection to the State to be deposited in the general fund of the State. In no event shall a person released on parole be required to pay more than one supervision fee per month. (1977, c. 711, s. 1; 1979, c. 749, s. 11; 1983, c. 562; 1985, c. 474, s. 6; 1987, c. 579, s. 3; c. 830, s. 17; 1989 (Reg. Sess., 1990), c. 1034, s. 2; 1991, c. 54, s. 1; 1991 (Reg. Sess., 1992), c. 1000, s. 2; 1993, c. 538, s. 39; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. —

Session Laws 1993, c. 538, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1989 (Reg. Sess., 1990), c. 1034, s. 2, which amended this section, was effective October 1, 1990, and applicable to all persons on supervised probation or parole prior to that date, and to all persons placed on supervised probation or parole on or after that date.

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, substituted "Post-Release Supervision and Parole Commission" for "Parole Commission" in the first sentence of subsection (a). As to the applicability of the amendment, see the editor's note.

§ 15A-1376. Arrest and hearing on parole violation.

(a) Arrest for Violation of Parole. — A parolee is subject to arrest by a law-enforcement officer or a parole officer for violation of conditions of parole only upon the issuance of an order of temporary or conditional revocation of parole by the Post-Release Supervision and Parole Commission. However, a parole revocation hearing under subsection (e) may be held without first arresting the parolee.

(b) When and Where Preliminary Hearing on Parole Violation Required. — Unless the hearing required by subsection (e) is first held or a continuance is requested by the parolee, a preliminary hearing on parole violation must be held reasonably near the place of the alleged violation or arrest and within seven working days of the arrest of a parolee to determine whether there is probable cause to believe that he violated a condition of parole. Otherwise, the parolee must be released seven working days after his arrest to continue on parole pending a hearing. If the parolee is not within the State, his preliminary hearing is as prescribed by G.S. 148-65.1A.

(c) Officers to Conduct Hearing. — The preliminary hearing on parole violation must be conducted by a judicial official, or by a hearing officer designated by the Post-Release Supervision and Parole Commission. No person employed by the Department of Correction may serve as a hearing officer at a hearing provided in this section unless he is a member of the Post-Release Supervision and Parole Commission or is employed solely as a hearing officer.

(d) Procedure for Preliminary Hearing on Parole Violation. — The Department of Correction must give the parolee notice of the preliminary hearing and its purpose, including a statement of the violations alleged. At the hearing, the parolee may appear and speak in his own behalf, may present relevant information, and may, on request, personally question witnesses and adverse informants, unless the hearing officer finds good cause for not allowing confrontation. If the person holding the hearing determines there is probable cause to believe the parolee violated his parole, he must summarize the reasons for his determination and the evidence he relied on. Formal rules of evidence do not apply at the hearing. If probable cause is found, the parolee may be held in the custody of the Department of Correction to serve the appropriate term of imprisonment, subject to the outcome of a revocation hearing under subsection (e).

(e) Revocation Hearing. — Before finally revoking parole, the Post-Release Supervision and Parole Commission must, unless the parolee waived the hearing or the time limit, provide a hearing within 45 days of the parolee's reconfinement to determine whether to revoke parole finally. The Post-Release Supervision and Parole Commission must adopt regulations governing the hearing and must file and publish them as provided in Article 5 of Chapter 150B of the General Statutes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 23-26; 1987, c. 827, s. 1; 1993, c. 538, s. 40; 1994, Ex. Sess., c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.15(a).)

Editor's Note. — Session Laws 1993, c. 538, s. 40, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective August 3, 1996, deleted "or the parolee waives the hearing" preceding "or a continuance is requested" in subsection (b).

ARTICLE 85A.

Parole of Certain Convicted Felons.

§§ 15A-1380.1, 15A-1380.2: Repealed by Session Laws 1993, c. 538, s. 24, effective October 1, 1994.

Editor's Note. — Session Laws 1993, c. 538, which repeals this Article, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

§§ 15A-1380.3, 15A-1380.4: Reserved for future codification purposes.

ARTICLE 85B.

Review of Sentences of Life Imprisonment Without Parole.

§ 15A-1380.5. Review of sentences of life imprisonment without parole.

(a) For purposes of this Article the term "life imprisonment without parole" shall include a sentence imposed for "the remainder of the prisoner's natural life".

(b) A defendant sentenced to life imprisonment without parole is entitled to review of that sentence by a resident superior court judge for the county in which the defendant was convicted after the defendant has served 25 years of imprisonment. The defendant's sentence shall be reviewed again every two years as provided by this section, unless the sentence is altered or commuted before that time.

(c) In reviewing the sentence the judge shall consider the trial record and may review the defendant's record from the Department of Correction, the position of any members of the victim's immediate family, the health condition of the defendant, the degree of risk to society posed by the defendant, and any other information that the judge, in his or her discretion, deems appropriate.

(d) After completing the review required by this section, the judge shall recommend to the Governor or to any executive agency or board designated by the Governor whether or not the sentence of the defendant should be altered or commuted. The decision of what to recommend is in the judge's discretion.

(e) The Governor or an executive agency designated under this section shall consider the recommendation made by the judge.

(f) The recommendation of a judge made in accordance with this section may be reviewed on appeal only for an abuse of discretion. (1994, Ex. Sess., c. 21, s. 7; c. 22, s. 36.)

Editor's Note. — Session Laws 1994, Extra Session, c. 21, s. 8, as amended by Session Laws 1994, Extra Session, c. 22, s. 36, effective May 1, 1994, provides: "This act becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after that date except that Section 7 of this act [which added this Article] becomes effective May 1, 1994, with respect to offenses committed on or after May 1, 1994, that are punishable under Article 2B of Chapter 14 of the General Statutes. Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal, expiration, or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

CASE NOTES

Cited in State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995).

Article 86.

Reports of Dispositions of Criminal Cases.

§ 15A-1381. Disposition defined.

As used in this Article, the term "disposition" means any action which results in termination or indeterminate suspension of the prosecution of a criminal charge. A disposition may be any one of the following actions:

(1) A finding of no probable cause pursuant to G.S. 15A-511(c)(2);
(2) An order of dismissal pursuant to G.S. 15A-604;
(3) A finding of no probable cause pursuant to G.S. 15A-612(a)(3);
(4) A return of not a true bill pursuant to G.S. 15A-629;
(5) Repealed by Session Laws 1989, c. 688, s. 4, effective October 1, 1989.
(6) Dismissal pursuant to G.S. 15A-931 or 15A-932;
(7) Dismissal pursuant to G.S. 15A-954, 15A-955 or 15A-959;
(8) Finding of a defendant's incapacity to proceed pursuant to G.S. 15A-1002 or dismissal of charges pursuant to G.S. 15A-1008;
(9) Entry of a plea of guilty or no contest pursuant to G.S. 15A-1011, without regard to the sentence imposed upon the plea, and even though prayer for judgment on the plea be continued;
(10) Dismissal pursuant to G.S. 15A-1227;
(11) Return of verdict pursuant to G.S. 15A-1237, without regard to the sentence imposed upon such verdict and even though prayer for judgment on such verdict be continued. (1981, c. 862, s. 1; 1989, c. 688, s. 4.)

§ 15A-1383. Plans for implementation of Article; punishment for failure to comply; modification of plan.

(a) On January 1, 1982, or on the first day of the month following the date on which any superior court district becomes effective under G.S. 7A-41, each senior resident superior court judge shall file a plan with the Director of the State Bureau of Investigation for the implementation of the provisions of this Article. The plan shall be entered as an order of the court on that date. In drawing up the plan, the senior resident superior court judge may consult with any public official having authority within his district or set of districts as defined in G.S. 7A-41.1(a) and with any other persons as he may deem appropriate. Upon the request of the senior resident superior court judge, the State Bureau of Investigation shall provide such technical assistance in the preparation of the plan as the judge desires.

(b) A person who is charged by the plan with a duty to make reports who fails to make such reports as required by the plan is punishable for civil contempt under Article 2 of Chapter 5A of the General Statutes.

(c) When the senior resident superior court judge modifies, alters or amends a plan under this Article, the order making such modification, alteration or amendment shall be filed with the Director of the State Bureau of Investigation within 10 days of its entry.

(d) Plans prepared under this Article are not "rules" within the meaning of Chapter 150B of the General Statutes or within the meaning of Article 6C of Chapter 120 of the General Statutes. (1981, c. 862, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 70; 1989, c. 770, s. 4.)

Editor's Note. — Article 6C of Chapter 120, referred to in subsection (d) of this section, is repealed. As to review of administrative rules, see now § 143B-30.1 et seq.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 88.

Post-Trial Motions and Appeal.

§ 15A-1401. Post-trial motions and appeal.

CASE NOTES

A motion for appropriate relief is a post-verdict motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

CASE NOTES

Definition. — A motion for appropriate relief is a post-verdict motion (or a post-sentencing motion where there is no verdict) made to correct errors occurring prior to, during, and after a criminal trial. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

A motion to withdraw a guilty plea made before sentencing is significantly different from a post-judgment of collateral attack on such a plea, which would be by a motion for appropriate relief. State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

Applied in State v. Potts, 334 N.C. 575, 433 S.E.2d 736 (1993); State v. Eastman, 113 N.C. App. 347, 438 S.E.2d 460 (1994).

Stated in Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, — U.S. —, 115 S. Ct. 678, 130

L. Ed. 2d 678 (1995).

Cited in State v. Taylor, 327 N.C. 147, 393 S.E.2d 801 (1990); Noland v. Dixon, 808 F. Supp. 485 (W.D.N.C. 1992); State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

CASE NOTES

Discretion of Court. — Upon a determination that the original sentence in a Driving With Revoked License case was not supported by the evidence, the district court judge clearly had the authority to vacate the sentence pursuant to subdivision (b)(4) of this section and to resentence the defendant pursuant to § 15A-1417(c). State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993), cert. granted, 335 N.C. 551, 439 S.E.2d 127 (1994).

Applied in State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (1994).

Cited in State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict; limitation as to time.

(a) At any time after verdict, a noncapital defendant by motion may seek appropriate relief upon any of the grounds enumerated in this section. In a capital case, a postconviction motion for appropriate relief shall be filed within 120 days from the latest of the following:

(1) The court's judgment has been filed, but the defendant failed to perfect a timely appeal;

(2) The mandate issued by a court of the appellate division on direct appeal pursuant to N.C.R. App. P. 32(b) and the time for filing a petition for writ of certiorari to the United States Supreme Court has expired without a petition being filed;

(3) The United States Supreme Court denied a timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina;

(4) Following the denial of discretionary review by the Supreme Court of North Carolina, the United States Supreme Court denied a timely petition for writ of certiorari seeking review of the decision on direct appeal by the North Carolina Court of Appeals;

(5) The United States Supreme Court granted the defendant's or the State's timely petition for writ of certiorari of the decision on direct appeal by the Supreme Court of North Carolina or North Carolina Court of Appeals, but subsequently left the defendant's conviction and sentence undisturbed; or

(6) The appointment of postconviction counsel for an indigent capital defendant.

(b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment:

(1) The acts charged in the criminal pleading did not at the

time they were committed constitute a violation of criminal law.

(2) The trial court lacked jurisdiction over the person of the defendant or over the subject matter.

(3) The conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina.

(4) The defendant was convicted or sentenced under a statute that was in violation of the Constitution of the United States or the Constitution of North Carolina.

(5) The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(6) Repealed by Session Laws 1995 (Regular Session, 1996), c. 719, s. 1, effective June 21, 1996.

(7) There has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required.

(8) The sentence imposed was unauthorized at the time imposed, contained a type of sentence disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level was illegally imposed, or is otherwise invalid as a matter of law. However, a motion for appropriate relief on the grounds that the sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing must be made before the sentencing judge.

(9) The defendant is in confinement and is entitled to release because his sentence has been fully served.

(c) Notwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, including recanted testimony, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence. A motion based upon such newly discovered evidence must be filed within a reasonable time of its discovery.

(d) For good cause shown, the defendant may be granted an extension of time to file the motion for appropriate relief. The presumptive length of an extension of time under this subsection is up to 30 days, but can be longer if the court finds extraordinary circumstances.

(e) Where a defendant alleges ineffective assistance of prior trial or appellate counsel as a ground for the illegality of his conviction or sentence, he shall be deemed to waive the attorney-client privilege with respect to both oral and written communications between such counsel and the defendant to the extent the defendant's prior counsel reasonably believes such communications are necessary to defend against the allegations of ineffectiveness. This waiver of the attorney-client privilege shall be automatic upon the filing of the motion for appropriate relief alleging ineffective assistance of prior counsel, and the superior court need not enter an order waiving the privilege.

(f) In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial or appellate counsel shall make available to the capital defendant's counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the capital defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the capital defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If upon examination of the files, the court finds that the files could not assist the capital defendant in investigating, preparing, or presenting a motion for appropriate relief, the court in its discretion may allow the State to withhold that portion of the files.

(g) The defendant may file amendments to a motion for appropriate relief at least 30 days prior to the commencement of a hearing on the merits of the claims asserted in the motion or at any time before the date for the hearing has been set, whichever is later. Where the defendant has filed an amendment to a motion for appropriate relief, the State shall, upon request, be granted a continuance of 30 days before the date of hearing. After such hearing has begun, the defendant may file amendments only to conform the motion to evidence adduced at the hearing, or to raise claims based on such evidence. (1977, c. 711, s. 1; 1981, c. 179, s. 7; 1993, c. 538, s. 25; 1994, Ex. Sess., c. 24, s. 14(b); 1995 (Reg. Sess., 1996), c. 719, s. 1.)

Editor's Note. — Session Laws 1993, c. 538, s. 25, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1995 (Reg. Sess., 1996), c. 719, s. 8, provides: "The deadline for filing a motion for appropriate relief in Section 1 applies to cases in which the trial court judgment is entered after October 1, 1996."

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, substituted "verdict; limitation" for "verdict and without limitation" in the catchline; in subsection (a), substituted "a noncapital" for "the" in the first sentence, and added the second sentence and subdivisions (a)(1) through (a)(6); deleted subdivision (b)(6), which read "Evidence is available which was unknown at the time of the trial, which could not with due diligence have been discovered or made available at the time, and which has a direct and material bearing upon the guilt or innocence of the defendant"; and added subsections (c) through (g).

Legal Periodicals. —

For note on North Carolina's new approach to recanted testimony, see 11 Campbell L. Rev. 57 (1988).

CASE NOTES

Granting of New Trial Is in Discretion of Trial Court. —

The State has the right to immediately appeal a superior court order granting a criminal defendant a new trial on the ground of newly discovered evidence. State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991).

Defendant had no right to appeal from a motion for appropriate relief brought pursuant to subdivision (b)(3) when the time for appeal had expired and no appeal was pending. State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

Once the defendant entered notice of appeal to Supreme Court, the superior court no longer had jurisdiction and could not consider the defendant's motion for appropriate relief based on alleged ineffective assistance of counsel. State v. Ginyard, 334 N.C. 155, 431 S.E.2d 11 (1993).

Nondisclosed information is material only if there is a reasonable probability that, had evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in outcome. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Failure to Inquire into Reservations After Guilty Plea. — A trial court's failure to inquire into defendant's reservations after the trial court accepted his guilty pleas was subject to being contested on grounds found in either subdivision (b)(3) or (b)(8) of this section. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Where evidence was discovered after the suppression hearing but prior to sentencing, the evidence was not "unknown or unavailable to the defendant at the time of the trial" (i.e., the sentencing hearing); therefore, defendant failed to satisfy this ground for appropriate relief. State v. Smothers, 108 N.C. App. 315, 423 S.E.2d 824 (1992).

Defendant Held Not Entitled to New Trial. — A confession to a murder by a person who was drunk and depressed at the time of his confession and who later recanted the confession did not entitle defendant to a new trial; the person who confessed was confused and unknowledgeable as to the facts of the murder. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Applied in State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

Stated in State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993), cert. granted, 335 N.C. 551, 439 S.E.2d 127 (1994).

Cited in State v. Quesinberry, 325 N.C. 125, 381 S.E.2d 681 (1989); Smith v. Dixon, 996 F.2d 667 (4th Cir. 1993); Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, — U.S. —, 115 S. Ct. 678, 130 L. Ed. 2d 678 (1995); State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (1994); State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995).

§ 15A-1417. Relief available.

CASE NOTES

Authority of Court. — Upon a determination that the original sentence in a Driving With Revoked License case was not supported by the evidence, the district court judge clearly had the authority to vacate the sentence pursuant to § 15A-1414(b)(4) and to resentence the defendant pursuant to subdivision (c) of this section. State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993), cert. granted, 335 N.C. 551, 439 S.E.2d 127 (1994).

§ 15A-1418. Motion for appropriate relief in the appellate division.

CASE NOTES

Remand Required. — Where the materials before the appellate court were insufficient to justify a ruling, the motion for appropriate relief had to be remanded to the trial court for the taking of evidence and a determination of the motion. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Applied in State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993).

Cited in State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990); State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990); State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992).

§ 15A-1419. When motion for appropriate relief denied.

(a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:

(1) Upon a previous motion made pursuant to this Article, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment or the previous motion was made during the pendency of the direct appeal.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(4) The defendant failed to file a timely motion for appropriate relief as required by G.S. 15A-1415(a).

(b) The court shall deny the motion under any of the circumstances specified in this section, unless the defendant can demonstrate:

(1) Good cause for excusing the grounds for denial listed in subsection (a) of this section and can demonstrate actual prejudice resulting from the defendant's claim; or

(2) That failure to consider the defendant's claim will result in a fundamental miscarriage of justice.

(c) For the purposes of subsection (b) of this section, good cause may only be shown if the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was:

(1) The result of State action in violation of the United States Constitution or the North Carolina Constitution including ineffective assistance of trial or appellate counsel;

(2) The result of the recognition of a new federal or State right which is retroactively applicable; or

(3) Based on a factual predicate that could not have been discovered through the exercise of reasonable diligence in time to present the claim on a previous State or federal postconviction review.

A trial attorney's ignorance of a claim, inadvertence, or tactical decision to withhold a claim may not constitute good cause, nor may a claim of ineffective assistance of prior postconviction counsel constitute good cause.

(d) For the purposes of subsection (b) of this section, actual prejudice may only be shown if the defendant establishes by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error.

(e) For the purposes of subsection (b) of this section, a fundamental miscarriage of justice only results if:

(1) The defendant establishes that more likely than not, but for

the error, no reasonable fact finder would have found the defendant guilty of the underlying offense; or

(2) The defendant establishes by clear and convincing evidence that, but for the error, no reasonable fact finder would have found the defendant eligible for the death penalty.

A defendant raising a claim of newly discovered evidence of factual innocence or ineligibility for the death penalty, otherwise barred by the provisions of subsection (a) of this section or G.S. 15A-1415(c), may only show a fundamental miscarriage of justice by proving by clear and convincing evidence that, in light of the new evidence, if credible, no reasonable juror would have found the defendant guilty beyond a reasonable doubt or eligible for the death penalty. (1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, s. 2.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, inserted "including motions filed in capital cases" following "appropriate relief" in subsection (a); in subdivision (a)(1), deleted the second sentence, which read "This subdivision does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right", and added "or the previous motion was made during the pendency of the direct appeal" to the end of the last sentence; inserted subdivision (a)(4); substituted "The court shall deny the motion under any of the circumstances specified in this section, unless the defendant can demonstrate" for "Although the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious" at the beginning of subsection (b); added subdivisions (b)(1) and (b)(2); and added subsections (c), (d), and (e).

CASE NOTES

Denial of Relief Where Claim Not Raised, etc. —

In accord with first paragraph in main volume. See Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, — U.S. —, 115 S. Ct. 678, 130 L. Ed. 2d 678 (1995).

Federal Habeas Corpus Petition Not a Substitute for State Review Provisions. —

Inmate's petition for habeas corpus was denied on the basis of the existence of an adequate and independent state law ground of decision in the form of his procedural default through the filing of multiple successive petitions as stated by Superior Court order. Ashe v. Styles, 39 F.3d 80 (4th Cir. 1994).

Denial under Subsection (a) Mandatory. — Although subsection (a) is phrased in permissive language, a review of the statute as a whole makes plain that it is a mandatory provision. Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, — U.S. —, 115 S. Ct. 678, 130 L. Ed. 2d 678 (1995).

Applicability of State Procedural Bar to Federal Habeas Review. — In order for a state procedural ground, such as in subsection (a), to provide an adequate basis for decision on a petitioner's motion for appropriate relief, thereby foreclosing federal habeas review of an issue, the state procedural bar must be applied "consistently or regularly." Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, — U.S. —, 115 S. Ct. 678, 130 L. Ed. 2d 678 (1995).

Applied in McDougall v. Rice, 685 F. Supp. 532 (W.D.N.C. 1988).

Quoted in Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683, 502 U.S. 1007, 112 S. Ct. 644, 116 L. Ed. 2d 661 (1991).

Cited in Smith v. Dixon, 766 F. Supp. 1370 (E.D.N.C. 1991), aff'd, 996 F.2d 667 (4th Cir. 1993); State v. Smothers, 108 N.C. App. 315, 423 S.E.2d 824 (1992).

§ 15A-1420. Motion for appropriate relief; procedure.

(a) Form, Service, Filing.

(1) A motion for appropriate relief must:

a. Be made in writing unless it is made:

1. In open court;
2. Before the judge who presided at trial;
3. Before the end of the session if made in superior court; and
4. Within 10 days after entry of judgment;

b. State the grounds for the motion;

c. Set forth the relief sought; and

d. Be timely filed.

(2) A written motion for appropriate relief must be served in the manner provided in G.S. 15A-951(b). When the written motion is made more than 10 days after entry of judgment, service of the motion and a notice of hearing must be made not less than five working days prior to the date of the hearing. When a motion for appropriate relief is permitted to be made orally the court must determine whether the matter may be heard immediately or at a later time. If the opposing party, or his counsel if he is represented, is not present, the court must provide for the giving of adequate notice of the motion and the date of hearing to the opposing party, or his counsel if he is represented by counsel.

(3) A written motion for appropriate relief must be filed in the manner provided in G.S. 15A-951(c).

(b) Supporting Affidavits.

(1) A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.

(2) The opposing party may file affidavits or other documentary evidence.

(b1) Filing Motion With Clerk; Review of Motion by Judge.

(1) The proceeding shall be commenced by filing with the clerk of superior court of the district wherein the defendant was indicted a motion, with service on the district attorney in noncapital cases, and service on both the district attorney and Attorney General in capital cases.

(2) The clerk, upon receipt of the motion, shall place the motion on the criminal docket. The clerk shall promptly bring the motion, or a copy of the motion, to the attention of the resident judge or any judge holding court in the county or district. In noncapital cases, the judge shall review the motion and enter an order whether the defendant should be allowed to proceed without the payment of costs, with respect to the appointment of counsel, and directing the State, if necessary, to file an answer. In capital cases, the judge shall review the motion and enter an order directing the State to file its answer within 60 days of the date of the order. If a hearing is necessary, the judge shall calendar the case for hearing without unnecessary delay.

(c) Hearings, Showing of Prejudice; Findings.

(1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. Upon the motion of either party, the judge may direct the attorneys for the parties to appear before him for a conference on any prehearing matter in the case.

(2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.

(3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. The defendant has no right to be present at such a hearing where only questions of law are to be argued.

(4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. The defendant has a right to be present at the evidentiary hearing and to be represented by counsel. A waiver of the right to be present must be in writing.

(5) If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

(6) A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.

(7) The court must rule upon the motion and enter its order accordingly. When the motion is based upon an asserted violation of the rights of the defendant under the Constitution or laws or treaties of the United States, the court must make and enter conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the grounds so asserted.

(d) Action on Court's Own Motion. — At any time that a defendant would be entitled to relief by motion for appropriate relief, the court may grant such relief upon its own motion. The court must cause appropriate notice to be given to the parties. (1965, c. 352, s. 1; 1973, c. 47, s. 2; 1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, ss. 3, 4.)

Effect of Amendments. — Session Laws 1995 (Reg. Sess., 1996), c. 719, ss. 3 and 4, effective June 21, 1996, inserted subdivision (a)(1)d., and made related changes; deleted former subsection (b1), regarding filing a petition with the clerk, delivery of a copy to the district attorney, and review of the petition by a judge; recodified former G.S. 15-217.1 as present subsection (b1); added the last sentence to subdivision (c)(1); and added the last sentence to subdivision (c)(3).

CASE NOTES

Remand for New Trial on Court's Motion. — Regardless of whether the defendant, twice charged with Driving While Impaired (DWI) and once with Driving While License Revoked, moved for appropriate relief or the district court judge granted such relief on his own motion, a trial court may set aside properly a guilty verdict, but it was improper for the trial court to thereafter enter a verdict of not guilty; the case should have been remanded for a new trial on the second DWI charge. State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993), cert. granted, 335 N.C. 551, 439 S.E.2d 127 (1994).

Amendments by Motion of Court. — Where judgments were facially invalid because both listed habitual felon as a substantive offense, as habitual felon status standing alone will not support a criminal sentence, the trial court had jurisdiction under subsection (d) to amend both judgments on its own motion. Accordingly, the trial court did not err in amending the judgment in the cases consolidated. State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

Applied in State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989); State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415; State v. Pharr, 110 N.C. App. 430, 430 S.E.2d 267 (1993).

Cited in State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Serzan, 119 N.C. App. 557, 459 S.E.2d 297 (1995).

§ 15A-1421. Indigent defendants.

CASE NOTES

Stated in State v. Potts, 334 N.C. 575, 433 S.E.2d 736 (1993).

§ 15A-1422. Review upon appeal.

CASE NOTES

North Carolina Supreme court review of collateral attacks is by way of certiorari and not direct appeal. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683, 502 U.S. 1007, 112 S. Ct. 644, 116 L. Ed. 2d 661 (1991).

Rules Regarding Certiorari Similar to Supreme Court's. — The rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court. Felton v. Barnett, 912 F.2d 92 (4th Cir. 1990), cert. denied, 498 U.S. 1032, 111 S. Ct. 693, 112 L. Ed. 2d 683, 502 U.S. 1007, 112 S. Ct. 644, 116 L. Ed. 2d 661 (1991).

Review After Time for Taking Appeal Expires. — Where defendant filed motion for relief long after the time for taking appeal had expired, he could obtain appellate review of the court's ruling only by a petition for a writ of certiorari. State v. Isom, 119 N.C. App. 225, 458 S.E.2d 420 (1995).

Appeal Following Remand. — Where Court of Appeals decided defendant's underlying appeal then remanded the motion for appropriate relief to the trial court, the order of the trial court on the motion for appropriate relief would be subject to review by writ of certiorari. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Defendant's Testimony Contradicted Proffered Instruction. — The trial court's failure to instruct the jury on defendant's law-abidingness and not using drugs was not prejudicial to defendant where defendant's own testimony contradicted testimony of witness that defendant was law-abiding and there was very strong evidence of defendant's guilt. State v. Moreno, 98 N.C. App. 642, 391 S.E.2d 860 (1990).

Defendant had no right to appeal from a motion for appropriate relief brought pursuant to § 15A-1415(b)(3) when the time for appeal had expired and no appeal was pending. State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

Quoted in State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995).

Cited in State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993).

Article 90.

Appeals from Magistrates and District Court Judges.

§ 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.

(a) A defendant convicted before a magistrate may appeal for trial de novo before a district court judge without a jury.

(b) A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law. Upon the docketing in the superior court of an appeal from a judgment imposed pursuant to a plea arrangement between the State and the defendant, the jurisdiction of the superior court over any misdemeanor dismissed, reduced, or modified pursuant to that plea arrangement shall be the same as was had by the district court prior to the plea arrangement.

(c) Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. Upon expiration of the 10-day period, if an appeal has been entered and not withdrawn, the clerk must transfer the case to the appropriate court.

(d) A defendant convicted by a magistrate or district court judge is not barred from appeal because of compliance with the judgment, but notice of appeal after compliance must be given by the defendant in person to the magistrate or judge who heard the case or, if he is not available, notice must be given:

(1) Before a magistrate in the county, in the case of appeals from the magistrate; or

(2) During an open session of district court in the district court district as defined in G.S. 7A-133, in the case of appeals from district court.

The magistrate or district court judge must review the case and fix conditions of pretrial release as appropriate. If a defendant has paid a fine or costs and then appeals, the amount paid must be remitted to the defendant, but the judge, clerk or magistrate to whom notice of appeal is given may order the remission delayed pending the determination of the appeal.

(e) Any order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order.

(f) Appeal pursuant to this section stays the execution of portions of the judgment relating to fine and costs. Appeal stays portions of the judgment relating to confinement when the defendant has complied with conditions of pretrial release. If the defendant cannot comply with conditions of pretrial release, the judge may order confinement in a local confinement facility pending the trial de novo in superior court.

(g) The defendant may withdraw his appeal at any time prior to calendaring of the case for trial de novo. The case is then automatically remanded to the court from which the appeal was taken, for execution of the judgment.

(h) The defendant may withdraw his appeal after the calendaring of the case for trial de novo only by consent of the court, and with the attachment of costs of that court, unless the costs or any part of the costs are remitted by the court. The case may then be remanded by order of the court to the court from which the appeal was taken for execution of the judgment with any additional court costs that attached and that have not been remitted. (1977, c. 711, s. 1; 1979, c. 758, p. 2; 1979, 2nd Sess., c. 1328, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 72; 1991, c. 63, s. 1.)

Editor's Note. — Session Laws 1991, c. 63, s. 1, which amended this section, was effective October 1, 1991, and applicable to offenses occurring on or after that date.

Legal Periodicals. — For note, "Constitutional Law — Enhanced Sentencing Under North Carolina's DWI Statute: Making Due Process Disappear — Field v. Sheriff of Wake County, N.C.," see 23 Wake Forest L. Rev. 517 (1988).

§ 15A-1432. Appeals by State from district court judge.

CASE NOTES

Applicability. — This section only applies to instances where the superior court reverses a dismissal of criminal charges by the district court. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Notice of appeal was inadequate to meet the requirements of subsection (b) because the basis for the appeal was not specified. The State had the responsibility to file the notice of appeal in the proper manner. Reliance on defendant's counsel to prepare proper notice did not suffice. State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830, appeal dismissed, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

Applied in State v. Huntley, 105 N.C. App. 709, 414 S.E.2d 380 (1992).

Cited in In re Harper, 118 N.C. App. 698, 456 S.E.2d 878 (1995); State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1441. Correction of errors by appellate division.

Errors of law may be corrected upon appellate review as provided in this Article, except that review of capital cases shall be given priority on direct appeal and in State postconviction proceedings. (1977, c. 711, s. 1; 1995 (Reg. Sess., 1996), c. 719, s. 6.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, added "except that review of capital cases shall be given priority on direct appeal and in State postconviction proceedings".

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Under the Fair Sentencing Act, the trial judge is required to make a record of aggravating and mitigating factors; this gives the reviewing court a means by which to decide whether the sentence is supported by sufficient evidence and whether the judge abused his discretion in weighing aggravating and mitigating factors. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1990).

§ 15A-1442. Grounds for correction of error by appellate division.

The following constitute grounds for correction of errors by the appellate division.

(1) Lack of Jurisdiction. —
  a. The trial court lacked jurisdiction over the offense.
  b. The trial court did not have jurisdiction over the person of the defendant.

(2) Error in the Criminal Pleading. — Failure to charge a crime, in that:
  a. The criminal pleading charged acts which at the time they were committed did not constitute a violation of criminal law; or
  b. The pleading fails to state essential elements of an alleged violation as required by G.S. 15A-924(a)(5).

(3) Insufficiency of the Evidence. — The evidence was insufficient as a matter of law.

(4) Errors in Procedure. —
  a. There has been a denial of pretrial motions or relief to which the defendant is entitled, so as to affect the defendant's preparation or presentation of his defense, to his prejudice.
  b. There has been a denial of a trial motion or relief to which the defendant is entitled, to his prejudice.
  c. There has been error in the admission or exclusion of evidence, to the prejudice of the defendant.
  d. There has been error in the judge's instructions to the jury, to the prejudice of the defendant.
  e. There has been a denial of a post-trial motion or relief to which the defendant is entitled, to his prejudice. This provision is subject to the provisions of G.S. 15A-1422.

(5) Constitutionally Invalid Procedure or Statute; Prosecution for Constitutionally Protected Conduct. —
  a. The conviction was obtained by a violation of the Constitution of the United States or of the Constitution of North Carolina.
  b. The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.
  c. The conduct for which the defendant was prosecuted was protected by the Constitution of the United States or the Constitution of North Carolina.

(5a) Insufficient Basis for Sentence. — The sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing.

(5b) Violation of Sentencing Structure. — The sentence imposed:
   a. Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
   b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
   c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class or offense and prior record or conviction level.

(6) Other Errors of Law. — Any other error of law was committed by the trial court to the prejudice of the defendant. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1979, (2nd Sess.) c. 1316, s. 47; 1981, c. 63, s. 1; 1981, c. 179, s. 14; 1993, c. 538, s. 26; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. —
Session Laws 1993, c. 538, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

CASE NOTES

No Error Where Defendant Made No Showing That Ruling Affected Defense. — Although it was arguably error to deny defendant's motion to produce results of analyses of a state's witness' handwriting, nevertheless, there was no error where defendant made no showing that the trial court's ruling affected the preparation or presentation of his defense to his prejudice. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Applied in State v. Dalton, 96 N.C. App. 65, 384 S.E.2d 573 (1989); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993).

§ 15A-1443. Existence and showing of prejudice.

Legal Periodicals. —
For note, "North Carolina Adopts the Inevitable Discovery Exception to the Exclusionary Rule: — State v. Garner," see 15 Campbell L. Rev. 305 (1993).

CASE NOTES

I. General Consideration.
II. Prejudicial Error.
III. Harmless Error.
IV. Rights under Federal Constitution.

I. GENERAL CONSIDERATION.

Test for "Plain Error," etc. —
In accord with first paragraph in the main volume. See State v. Hartman, 90 N.C. 379, 368 S.E.2d 396 (1988); State v. Lane, 328 N.C. 598, 403 S.E.2d 267, cert. denied, 502 U.S. 915, 112 S. Ct. 319, 116 L. Ed. 2d 261 (1991).

Where defendant took issue with that portion of the trial court's final instructions in which the jury was charged that testimony regarding prior, similar offenses by defendant could be considered to show defendant's motive for murder, his intent to commit murder, and his scienter regarding the consequences of his attack, because defendant failed to object to this alleged error, appellate review is guided by the "plain error" analysis, whereby the burden on defendant to show prejudice is even greater than that imposed by this section. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Before an error by the trial court amounts to "plain error," we must be convinced that absent the error the jury probably would have reached a different verdict; therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by this section upon defendants who have preserved their rights by timely objection. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994), cert. denied, — U.S. —, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

Decisions Affected by McKoy v. North Carolina. — On appeal, the State must demonstrate a McKoy error (McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), holding unanimity requirement for mitigating factors at sentencing unconstitutional) was harmless beyond a reasonable doubt because the error is of constitutional dimension. State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990), cert. denied, 489 U.S. 1051, 111 S. Ct. 763, 112 L. Ed. 2d 782 (1991).

Unless the State demonstrates that a McKoy error was harmless beyond a reasonable doubt, defendant must have a new sentencing proceeding. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Because McKoy error under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369, is of constitutional dimension, the State bears the burden of demonstrating that it was harmless beyond a reasonable doubt. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

When a motion to continue is based on a constitutional right, the trial court's ruling becomes a question of law and, upon appeal, it is subject to review by examination of the particular circumstances as presented by the record, and the denial of a motion to continue, regardless of its nature, is grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced as a result of the error. If the error amounts to a constitutional violation, there is prejudice requiring a new trial unless the State satisfies the court that the error is harmless beyond a reasonable doubt. State v. Gardner, 322 N.C. 591, 369 S.E.2d 593 (1988).

Standard of Review. — Whether the motion for appropriate relief is made by a party or by the court itself, the standard of review for the failure to give a requested instruction which results in a violation of the defendant's constitutional rights remains the same under subsection (b); such an error is deemed prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. State v. Pharr, 110 N.C. App. 430, 430 S.E.2d 267, cert. denied, 334 N.C. 437, 433 S.E.2d 183 (1993).

Review of Alleged Error Limited. — Where defendant failed to object to jury instruction at trial, Supreme Court's review of alleged error was limited on appeal to review for plain error. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Applied in State v. Burton, 322 N.C. 447, 368 S.E.2d 630 (1988); State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988); State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988); State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988); State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988); State v. Smith, 323 N.C. 359, 372 S.E.2d 557 (1988); State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988); State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988); State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. Clark, 344 N.C. 146, 377 S.E.2d 54 (1989); State v. Ball, 324 N.C. 233, 377 S.E.2d 70 (1989); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. McDowell, 93 N.C. 289, 378 S.E.2d 48 (1989); State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989); State v. Reynolds, 93 N.C. App. 552, 378 S.E.2d 557 (1989); State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989); State v. Groves, 324 N.C. 360, 378 S.E.2d 763 (1989); State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989); State v. Hanible, 94 N.C. App. 204, 379 S.E.2d 696 (1989); State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989); State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989); State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989); State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989); State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989); State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990); State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990); State v. Joyce, 97 N.C. App. 464, 389 S.E.2d 136 (1990); State v. Von Cunningham, 97 N.C. App. 631, 389 S.E.2d 286 (1990); State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990); State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990); State v. Noble, 326 N.C. 581, 391 S.E.2d 168 (1990); State v. Murphy, 100 N.C. App. 33, 394 S.E.2d 300 (1990); State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990); State v. Richardson, 100 N.C. App. 240, 395 S.E.2d 143 (1990); State v. Davis, 101 N.C. App. 12, 398 S.E.2d 645 (1990); State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991); State v. Stevenson, 328 N.C. 542, 402 S.E.2d 396 (1991); State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991); State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990); State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991); State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991); State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991); State v. Gross, 104 N.C. App. 97, 408 S.E.2d 531 (1991); State v. Angel, 330 N.C. 85, 408 S.E.2d 724 (1991); State v. McLaughlin, 330 N.C. 66, 408 S.E.2d 732 (1991); State v. Miller, 330 N.C. 56, 408 S.E.2d 846 (1991); State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991); State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991); State v. Wallace, 104 N.C. App. 498, 410 S.E.2d 226 (1991); State v. Marshall, 105 N.C. App. 518, 414 S.E.2d 95 (1992); State v. Shaw, 106 N.C. App. 433, 417 S.E.2d 262 (1992); State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992); State v. Sluka, 107 N.C. App. 200, 419 S.E.2d 200 (1992); State v. Stallings, 107 N.C. App. 241, 419 S.E.2d 586 (1992); State v. Brown, 332 N.C. 262, 420 S.E.2d 147 (1992); State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992); State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475 (1992); State v. Keel, 333 N.C. 52, 423 S.E.2d 458 (1992); State v. Pope, 333 N.C. 106, 423 S.E.2d 740 (1992); State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992); State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141 (1993); State v. Syriani, 333 N.C. 350, 428 S.E.2d 118, cert. denied, 510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993), reh'g denied, 510 U.S. 1066, 114 S. Ct. 745, 126 L. Ed. 2d 707 (1994); State v. Hicks, 333 N.C. 467, 428 S.E.2d 167 (1993); State v. Summey, 109 N.C. App. 518, 428 S.E.2d 245 (1993); State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808 (1993), aff'd, 337 N.C. 674, 447 S.E.2d 349 (1994); State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993); State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993); State v. Parker, 111 N.C. App. 359, 432 S.E.2d 705 (1993); State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. denied, — U.S. —, 114 S. Ct. 2784, 129 L. Ed. 2d 895, reh'g denied, — U.S. —, 115 S. Ct. 26, 129 L. Ed. 2d 924 (1994); State v. Tucker, 111 N.C. App. 907, 433 S.E.2d 476 (1993); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Ramseur, 112 N.C. App. 429, 435 S.E.2d 837 (1993); State v. Hughes, 114 N.C. App. 742, 443 S.E.2d 76, cert. denied, 337 N.C. 697, 448 S.E.2d 536 (1994); State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994); State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994); State v. Jones, 336 N.C. 490, 445 S.E.2d 23 (1994); State v. Eason, 336 N.C. 73, 445 S.E.2d 917 (1994); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994); State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994), cert. denied and appeal dismissed, 339 N.C. 741, 454 S.E.2d 661 (1995); State v. Brown, 117 N.C. App. 239, 450 S.E.2d 538 (1994); State v. Thompson, 118 N.C. App. 33, 454 S.E.2d 271 (1995); State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, — U.S. —, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994); State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995); State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995); State v. Kirkland, 119 N.C. App. 185, 457 S.E.2d 766 (1995), aff'd, 342 N.C. 891, 467 S.E.2d 242 (1996); State v. Jackson, 340 N.C. 301, 457 S.E.2d 862 (1995); State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995); State v. Serzan, 119 N.C. App. 557, 459 S.E.2d 297 (1995); State v. Ratliff, 341 N.C. 610, 461 S.E.2d 325 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995); State v. McLemore, 343 N.C. 240, 470 S.E.2d 2 (1996).

Quoted in State v. Mash, 328 N.C. 61, 399 S.E.2d 307 (1991); State v. Bruno, 108 N.C. App. 401, 424 S.E.2d 440 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); State v. Sierra, 335 N.C. 753, 440 S.E.2d 791 (1994); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995); State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995).

Stated in State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989); State v. Arnold, 98 N.C. App. 518, 392 S.E.2d 140 (1990); State v. Lloyd, 329 N.C. 662, 407 S.E.2d 218 (1991); State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992); State v. Jeffries, 333 N.C. 501, 428 S.E.2d 150 (1993); State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Davis, 110 N.C. App. 272, 429 S.E.2d 403 (1993); State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993); State v. Smith, 112 N.C. App. 512, 436 S.E.2d 160 (1993); State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994).

Cited in State v. Vaughn, 324 N.C. 301, 377 S.E.2d 738 (1989); State v. Knight, 93 N.C. App. 460, 378 S.E.2d 424 (1989); State v. Rivers, 324 N.C. 573, 380 S.E.2d 359 (1989); State v. Bridges, 325 N.C. 529, 385 S.E.2d 337 (1989); State v. Seaberry, 97 N.C. App. 203, 388 S.E.2d 184 (1990); State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990); State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. Smith, 99 N.C. App. 67, 392 S.E.2d 642 (1990); State v. Simpson, 327 N.C. 178, 393 S.E.2d 771 (1990); State v. Cotton, 99 N.C. App. 615, 394 S.E.2d 456 (1990); State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990); State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991); State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991); State v. McPhail, 329 N.C. 636, 406 S.E.2d 591 (1991); State v. Artis, 329 N.C. 679, 406 S.E.2d 827 (1991); State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991); State v. Cotton, 329 N.C. 764, 407 S.E.2d 514 (1991); State v. Turner, 330 N.C. 249, 410 S.E.2d 847 (1991); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Suddreth, 105 N.C. App. 122, 412 S.E.2d 126 (1992); State v. Martin, 105 N.C. App. 182, 412 S.E.2d 134 (1992); State v. Meyer, 330 N.C. 738, 412 S.E.2d 339 (1992); State v. Jones, 105 N.C. App. 576, 414 S.E.2d 360 (1992); State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992); State v. Quick, 106 N.C. App. 548, 418 S.E.2d 291 (1992); State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992); State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Greene, 332 N.C. 565, 422 S.E.2d 730 (1992); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993); State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993); State v. Wills, 110 N.C. App. 206, 429 S.E.2d 376 (1993); State v. Gish, 111 N.C. App. 165, 431 S.E.2d 856 (1993); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994); State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994); State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, — U.S. —, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994); State v. Alexander, 337 N.C. 182, 446 S.E.2d 83 (1994); State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994); State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994); State v. Perry, 338 N.C. 457, 450 S.E.2d 471 (1994); State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994); State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994); State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. Myers, 118 N.C. App. 452, 455 S.E.2d 492 (1995); State v. Johnson, 341 N.C. 104, 459 S.E.2d 246 (1995); State v. Nelson, 341 N.C. 695, 462 S.E.2d 225 (1995); State v. King, 342 N.C. 357, 464 S.E.2d 288 (1995); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995); State v. Frazier, 121 N.C. App. 1, 464 S.E.2d 490 (1995); State v. Bartlett, 121 N.C. App. 521, 466 S.E.2d 302 (1996); State v. Dale, 343 N.C. 71, 468 S.E.2d 39 (1996).

II. PREJUDICIAL ERROR.

Test for prejudicial error, etc. — The test under this section is whether there is a reasonable possibility that a different result would have been reached at trial had the error not been committed. State v. Brown, 101 N.C. App. 71, 398 S.E.2d 905 (1990).

In order to show prejudicial error, etc. —

In accord with the main volume. See State v. Patterson, 103 N.C. App. 195, 405 S.E.2d 200.

An error is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed. State v.

Hardy, 104 N.C. App. 226, 409 S.E.2d 96 (1991).

Presumption of Correctness. —

A trial court's ruling on an evidentiary point will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect. Even if the complaining party can show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Error Must Affect Probable Result of Trial. —

Where trial court erred by not allowing defendant to question the complainant in the presence of the jury regarding the allegation of rape made five months earlier and subsequently withdrawn, defendant was entitled to a new trial because there was a reasonable probability that the outcome of the trial would have been different. State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996).

Defendant not entitled to new trial based on trial errors, etc. —

For case holding that the trial court's failure to give a requested identification charge was error, although error was not prejudicial error under subsection (a), see State v. Shaw, 322 N.C. 797, 370 S.E.2d 546 (1988).

Although trial court did not allow defense counsel to impeach defendant with evidence of his prior convictions, where defendant made no offer of proof as to the matter excluded, nor was the answer apparent from the context in which the question was asked of defendant, the defendant failed to carry his burden of showing prejudice and the court had no basis for concluding that a substantial right of defendant was affected. State v. Locklear, 322 N.C. 468, 368 S.E.2d 377 (1988).

And Cannot Result from Defendant's Own Conduct. — While the term "duress" may be a legal term of art, the definition of which was not readily apparent to defendant's expert witness, the expert testimony complained of was offered by defendant's own expert witness in regard to defendant's mental condition; a defendant may not complain of prejudice resulting from her own conduct. State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

Burden is on the appellant, etc. —

Defendant has the burden under this section of demonstrating that but for the erroneous admission of challenged evidence, there is a "reasonable possibility" that the jury would have reached a verdict of not guilty. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993).

Incorrect Instruction. — Where the first instruction given by the trial court, although in error, would not have required a new trial if the subsequent instruction was correct, but the second instruction was not correct, the defendants satisfied their burden of showing prejudicial error and were entitled to a new trial. State v. Kelly, 120 N.C. App. 821, 463 S.E.2d 812 (1995).

When Inquiry into Prior Convictions Is Prejudicial. — Inquiry into prior convictions which exceeds the limitations established in State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977) is reversible error. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

As prosecutor's questions on cross-examination were inquiries which went beyond the time and place of defendant's convictions and the punishment imposed, and as the case turned on credibililty, defendant was prejudiced by the trial judge's order overruling defendant's objections to such questions. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

Where murder defendant's incriminating statements were products of police-initiated interrogation without the presence of counsel, the trial court erroneously denied defendant's motion to suppress those statements, as the evidence of her guilt, other than her own confession, was less than overwhelming and, therefore, admission of her incriminating statements was not harmless beyond a reasonable doubt. State v. Robey, 91 N.C. App. 198, 371 S.E.2d 711, cert. denied, 323 N.C. 479, 373 S.E.2d 874 (1988).

Erroneous Exclusion of Evidence of Defendant's Understanding of Miranda. — The exclusion of evidence concerning defendant's understanding of the Miranda warnings was error. As a matter of law that there was a reasonable possibility that, had the error not been committed, a different result would have been reached at the trial. State v. Sanchez, 328 N.C. 247, 400 S.E.2d 421 (1991).

Error Admitting Pretrial Statement. — State failed to meet burden of demonstrating that error in admitting defendant's pretrial statement was harmless beyond a reasonable doubt where the statement at issue contained admissions to elements of all three charged offenses. State v. Morris, 332 N.C. 600, 422 S.E.2d 578 (1992).

It was reversible error for trial court to allow extrinsic evidence of prior inconsistent statements to impeach defense witness' testimony when that testimony concerned matters collateral to the issues in the case (what he did or did not tell his parole officer), and had that evidence not been erroneously admitted there was a reasonable possibility of a different result. See State v. Williams, 322 N.C. 452, 368 S.E.2d 624 (1988).

Evidence Erroneously Admitted as Substantive Evidence. — Experts statement, which intimated the cause of the alleged victim's post-traumatic stress syndrome was the sexual abuse inflicted by defendant, was erroneously admitted as substantive evidence to prove victim suffered a sexual assault by anal penetration and that defendant committed the offense. State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995).

The state could not show that the improper introduction of letter that contained the only evidence of defendant's motive to kill the victim was harmless beyond a reasonable doubt. State v. Swindler, 339 N.C. 469, 450 S.E.2d 907 (1994).

Erroneous Jury Instructions as to Mitigating Circumstances. — Where the trial court instructed the jury to answer each mitigating circumstance "no" if the jury did not unanimously find the circumstance by a preponderance of the evidence the instruction constituted error as a juror could have found the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because he was under the influence of drugs where defendant consumed two beers and smoked five marijuana cigarettes six-and-one-half hours before the murder. State v. Quesinberry, 328 N.C. 288, 401 S.E.2d 632 (1991).

Where the trial court submitted eight possible mitigating circumstances and the jury, operating under a unanimity instruction, found only one, and there was evidence to support at least some of the circumstances not found, and the State did not deny that the unanimity requirement might have affected at least one juror's vote on at least some of the seven circumstances not found and thus affected the jury's sentencing recommendation, the Supreme Court could not conclude that the McKoy error was harmless, and would order a new sentencing proceeding. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

McKoy error as to issue of whether murder was committed while the defendant was under the influence of a mental or emotional disturbance was not harmless, and because of it, defendant was entitled to be given a new capital sentencing hearing. State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991).

Erroneous Instruction on Willfulness. — Where, in a prosecution of a Nursing Director under § 131E-189, for failing to perform acts required by the North Carolina Medical Care Commission, under the instructions given on the element of willfulness, a jury could have concluded that the defendant was guilty if they determined the defendant failed to act, but with a proper instruction the jury would have understood that the defendant's decisions, even if intentional, were not necessarily a violation of the law, the error required a new trial. State v. Whittle, 118 N.C. App. 130, 454 S.E.2d 688 (1995).

Prejudicial Error in Instructions on Intoxication. — Where although there was little question that defendant committed a homicide, the case was relatively close on the degree of his culpability, due to both substantial evidence of defendant's intoxication at the time he committed the crime and the manner of the fatal assault and defendant's actions immediately before and after it, and the central issue for the jury in light of the evidence adduced was whether defendant should be found guilty of first or second degree murder, since this issue hinged largely on how the jury would consider the evidence of defendant's intoxication, the court was satisfied that had an error in the instructions on intoxication not been made, there was a reasonable possibility that a different result would have obtained at trial and, therefore, defendant would be awarded a new trial. State v. Mash, 323 N.C. 339, 372 S.E.2d 532 (1988).

Failure to appoint additional counsel for the defendant in a timely manner violated the mandate of this section and was prejudicial error per se. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

Exclusion of Evidence Relevant to Defense. —

The trial court erroneously sustained the State's objection to the question about whether defendant felt that his life was threatened because that evidence was highly relevant to the crucial question of defendant's state of mind at the time of the shooting, his knowledge and belief of danger, and his knowledge and belief of the necessity for action in relation to his plea of self-defense, and the error was prejudicial since the excluded testimony went to the heart of defendant's self-defense claim. State v. Webster, 324 N.C. 430, 378 S.E.2d 748 (1989).

Error in excluding lay testimony on defendant's capacity to proceed required that verdict and judgment be vacated and further proceedings ordered; there was reasonable possibility trial court might have reached different conclusion in determining defendant's capacity to proceed where the only evidence offered suggesting defendant was competent to proceed to trial was two reports written by doctor some three and five months before hearing and the evidence of defendant's condition during the three to five months before trial was improperly excluded testimony of lay witnesses. State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989).

Error Held Prejudicial. — Based on the presentation of evidence, the state's arguments, and the jury instruction, the jury almost certainly considered, improperly, defendant's entire criminal history in determining whether the statutory mitigating circumstance of no significant history of prior criminal activity existed. This error entitled defendant to a new sentencing proceeding. State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

Where the prosecutor's closing argument included direct references to defendant's failure to testify, the trial court's failure to give a curative instruction was error requiring a new trial. State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

Because of the error in the trial court's instruction on acting in concert, the jury's findings of guilt of first-degree murder on the theory of premeditation and deliberation was reversed on a finding of prejudice. State v. Blankenship, 337 N.C. 543, 447 S.E.2d 727 (1994).

In child sexual abuse case where the medical evidence was in conflict, testimony by doctor that was offered to show that the victim was being truthful about allegations was prejudicial. For this reason defendant was entitled to a new trial. State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

In spite of the court's conclusion that the admission of the witness's testimony was error, the error was not so prejudicial as to warrant a new trial. State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994).

Alleged Prior Bad Acts Erroneously Admitted. — Where defendant was accused of sexually abusing his 14-year-old adopted daughter, the trial court erred in admitting testimony of alleged prior bad acts committed by defendant; namely, defendant's alleged frequent nudity, his alleged frequent fondling of himself, and an adulterous affair in which he was allegedly involved, as under the circumstances of this case, the admission of such evidence was highly prejudicial and of questionable relevance. State v. Maxwell, 96 N.C. App. 19, 384 S.E.2d 553, cert. denied, 326 N.C. 53, 389 S.E.2d 83 (1990).

In case charging defendant with sexual abuse of young children, where defendant's credibility was critical to her defense, erroneous admission of evidence of her prior drug use was not harmless. State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870, cert. denied, 341 N.C. 424, 461 S.E.2d 768 (1995).

Improper Evidence Reinforced by Jury Argument Held Prejudicial. — Questions of the district attorney and the argument to the jury as to the defendant's failure to tell the police of his defense were prejudicial errors; since there was not an eyewitness to the shooting other than the defendant, and since his defense depended on the jury's acceptance of his version of the event, the State had not demonstrated beyond a reasonable doubt that it was harmless to attack the credibility of this version by improper evidence, which improper evidence was reinforced by jury argument. State v. Hoyle, 325 N.C. 232, 382 S.E.2d 752 (1989).

Defendant's Absence Held Not Prejudicial. — Nothing in the record showed that defendant was prejudiced by his absence during part of the presentation of the prosecution's evidence in defendant's capital case where all proceedings took place in open court, where everything that took place was reflected in the record, and where the record showed that defense counsel were in court and participated throughout defendant's absence to protect his interests, and that the trial judge told counsel they could confer with the defendant as to the possibility of his return at any time, and where the trial judge undertook to perform his duty to assure defendant's presence. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Exclusion of Expert Testimony Held Error. — Trial court's error in excluding expert testimony concerning the defendant's mental capacity was prejudicial. State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

III. HARMLESS ERROR.

The proper standard for reversal in reviewing violations of defendant's state constitutional right to be present at his capital trial is the "harmless beyond a reasonable doubt" standard, and not the standard apparently prescribed in subsection (a) of this section. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Trial court's failure to order a transcript of sentencing hearing did not constitute prejudicial error. In the absence of an abuse of discretion, a judgment will not be disturbed because of either the sentencing procedure or procedural conduct. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

Admission of irrelevant evidence, etc. —

Although evidence was not relevant to any issue in the case and had little probative value, there was no tendency to prejudice the defendant. State v. Beamer, 339 N.C. 477, 451 S.E.2d 190 (1994).

Admission of irrelevant evidence will be treated as harmless unless the defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

The admission of the gun was harmless beyond a reasonable doubt since defendant's defense to the charge of murder was self-defense, not that he was not the killer. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

The admission of the victim's Bibles into evidence, although not relevant, did not constitute error prejudicial to defendant. State v. Rose, 335 N.C. 301, 439 S.E.2d 518, cert. denied, — U.S. —, 114 S. Ct. 2770, 129 L. Ed. 2d 883 (1994).

Merely asking an improper question to which an objection is sustained does not automatically result in prejudice to a defendant; when the trial court sustains a defendant's objections to improper questions and instructs the jury to disregard such questions, any possible prejudice to the defendant is cured. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Trial court's ruling excluding expert's opinion as to defendant's ability to adjust to prison life was error; however, the error was harmless due to testimony on same subject by other expert. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, — U.S. —, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995).

Evidence Was Not Harmless Beyond Reasonable Doubt. — Jury's exposure to information on photograph which violated defendant's constitutional right of confrontation was not harmless beyond a reasonable doubt; unauthenticated evidence would have been inadmissible at trial as hearsay and incompetent character evidence and the evidence went to the heart of defendant's alibi defense. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Violation of Rights Held Harmless Error. — Although a defendant's exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be used against him at trial, such a constitutional error will not warrant a new trial where it was harmless beyond a reasonable doubt. Thus, where any violation of the defendant's rights was de minimis and the evidence against defendant was overwhelming, the trial court's error, if any, was harmless beyond a reasonable doubt. State v. Elmore, 337 N.C. 789, 448 S.E.2d 501 (1994).

Admission of Improper Testimony Held Harmless Error. —

Even if the trial court erred in excluding a statement made by murder victim two weeks before his death, to the effect that he wanted to buy a gun to kill the defendant, was erroneous, defendant failed to carry his burden of showing that he was prejudiced thereby, where extensive testimony of similar import was admitted. State v. Torres, 322 N.C. 440, 368 S.E.2d 609 (1988).

Although it was error to allow prosecutor to cross-examine defendant in a murder case about a fight he was involved in at the hospital where his competency evaluation took place, the error was held harmless where the testimony portrayed defendant as the victim rather than the aggressor and tended to cast him in a favorable light, and there was no reasonable possibility that a different result would have been reached at trial absent the error. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Where improperly admitted evidence merely corroborated testimony from other witnesses, there was no reasonable possibility that the jury would have reached a different result absent the testimony. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where defendant contended the trial court erroneously admitted the witness's testimony that she was "afraid" of defendant at the time of trial and where defendant did not object at trial nor assign error on appeal to the witness's immediately preceding testimony that defendant had threatened to kill her and sell her child if she reported the crime, there was not a reasonable possibility that a different result would have been reached if the trial court had excluded the witness's statement that she was afraid of defendant at the time of trial. State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251, cert. denied, 325 N.C. 276, 384 S.E.2d 528 (1989).

Testimony regarding defendant's failure to spend time with his sons did not tend to show that the victim was afraid of defendant or that she had no intention of reconciling with him. Rather, the evidence tended to show defendant's bad character and, as such, should not have been admitted. In light of all the evidence that was properly introduced, however, this tangential bit of evidence could not have affected the outcome of the trial. Therefore, it was not prejudicial error. State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992).

By asserting the testimonial privilege in response to selected questions on cross-examination, witness attempted to disclose part of the facts and withhold the rest. The trial court should have either required witness to answer the questions, or stricken all or part of his direct testimony after allowing him to assert the testimonial privilege; the failure of the trial court to strike all or part of his direct testimony was harmless error. State v. Ray, 336 N.C. 463, 444 S.E.2d 918 (1994).

Unanimity Requirement for Mitigating Factors at Sentencing Held Not Harmless Error. — Where, in a murder prosecution the jury failed to find unanimously several proposed mitigating circumstances supported by substantial evidence, and where some, but not all, jurors may have found credible the evidence in support of some or all of these circumstances and that the nonstatutory circumstances had mitigating value, had each juror been allowed to consider such of these circumstances as each found to exist, and the evidence supporting them, in the final weighing process, it cannot be said beyond a reasonable doubt that there would not have been a different result in the sentence. State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).

Trial court's instructions, in a capitol sentencing proceeding, that jury unanimity was required as to any mitigating circumstances was not harmless error where evidence was substantial enough that jury might reasonably have found each of six possible mitigating circumstances; jury was not required to indicate whether it found each individual mitigating circumstances to exist, but only to indicate on the form provided that "yes," it had found "one or more" of the mitigating circumstances to exist. State v. McNeil, 327 N.C. 388, 395 S.E.2d 106 (1990), cert. denied, 499 U.S. 942, 111 S. Ct. 1043, 113 L. Ed. 2d 459 (1991); State v. Upchurch, 332 N.C. 439, 421 S.E.2d 577 (1992).

Method of Jury Selection Not Prejudicial. — Voir dire served the dual purpose of ascertaining whether grounds existed for challenging for cause and of enabling counsel for the state and for the defendant to exercise intelligently their peremptory challenges, and any error in restricting defendant's questioning of prospective jurors was harmless error. State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995).

Trial court's failure to conduct a voir dire in order to determine the admissibility of in-court identification testimony allegedly tainted by a suggestive pretrial photographic line-up was error; however, assuming, arguendo, that the photographic line-up was impermissibly suggestive, the presence of clear and convincing evidence of the independent origin of the identification, rendered the trial court's failure to conduct a voir dire harmless. State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992).

Erroneously Admitted In-Court Identification of Defendant Held Harmless. — In a rape case where victim's in-court identification of defendant was challenged by defendant the court recognized that only in the most unusual situations would an erroneously admitted in-court identification of defendant by victim be harmless beyond a reasonable doubt. But the facts here where the victim was never able to positively identify defendant coupled with school security officer's unequivocal identification left any improperly suggestive identification procedures harmless. State v. Parker, 322 N.C. 559, 369 S.E.2d 596 (1988).

Reading Portion of Fifth Amendment Held Harmless. — The trial court did not commit reversible error in prohibiting the reading to the jury of that portion of the Fifth Amendment pertinent to the defendant's election not to testify, where in his general instructions to the jury, the judge gave an accurate and complete statement of the law applicable to defendant's election not to testify. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Where the trial court's failure to instruct on alibi did not reduce the State's burden of proof, beyond a reasonable doubt, of every element of the crimes charged, and the trial court's instructions did not violate the defendant's due process rights, the harmless error standard of subsection (a) of this section, rather than the provisions of subsection (b), applied. State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992), cert. denied, 507 U.S. 1055, 113 S. Ct. 1955, 123 L. Ed. 2d 659 (1993).

No Error in Deputy's Testimony That Defendant Stated His Birthdate During Booking. — In prosecution for first-degree sexual offense and taking indecent liberties with children, the defendant was not prejudiced by the admission of the deputy's testimony that the defendant stated his birthdate during the booking procedure, where there was ample evidence aside from defendant's statement from which the jury could have found that defendant was at least 16 years of age at the time of the crimes; therefore, even assuming that the statement was discoverable, that the state should have produced it pursuant to defendant's discovery request and that the trial court should have imposed sanctions pursuant to § 15A-910, the error was harmless. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

No Error Where Defendant Failed to Show Prejudice. — Where the jury was selected from citizens of another county, the trial court quite frequently admonished the jury against discussing the case or gaining information about it from outside sources, and defendant presented no evidence that the jury did anything other than follow the trial court's orders, he failed to show prejudice in the trial court's decision not to sequester jurors. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

In prosecution for rape, first-degree kidnapping, sexual offense, and common law robbery, the admission of the officer's testimony that the defendant had a rifle in his car when he was arrested, if error, was not prejudicial, where there was no intimation by the officer that the defendant attempted to use the rifle when he was arrested, that was used in the commission of any crime or that possession of the rifle was otherwise unlawful. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Where jury convicted defendant of murder in the first degree based on malice, premeditation and deliberation, and based on the felony murder rule, defendant's contention that the trial court's instructions to the jury on acting in concert and aiding and abetting allowed him to be convicted on theories unsupported by the evidence was rejected. Without the instructions, the jury would nevertheless have convicted defendant of first degree murder under either theory because the evidence, when viewed as a whole, was sufficient to permit the jury to infer that defendant and his brother acted together with a common purpose to commit, at least, the robbery and that the defendant aided and abetted his brother in the commission of the crime of murder in the first degree based on the felony murder rule. State v. Lane, 328 N.C. 598, 403 S.E.2d 267, cert. denied, 502 U.S. 915, 112 S. Ct. 319, 116 L. Ed. 2d 261 (1991).

Even if the implication that defendant knowingly purchased a stolen handgun was improper argument, there being no evidence to support it, the defendant was unable to sustain the burden of showing prejudice. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

Where there was overwhelming evidence of defendant's guilt, there was not a reasonable possibility that the jury would have reached a different result if witness had not testified, thus, any error in the admission of the testimony was not prejudicial. State v. Sneeden, 336 N.C. 482, 444 S.E.2d 218 (1994).

Where prosecutor asserted that defendant was lying, although the statements constituted error, defendant failed to object, and considering all the facts and circumstances revealed in the record which showed overwhelming evidence against defendant, defendant failed to show that the error was prejudicial. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, — U.S. —, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), — N.C. —, 472 S.E.2d 23 (1996).

In light of the evidence that was properly admitted, the defendant did not meet his burden of showing that there was a reasonable possibility that a different result would have been reached if the trial court had allowed expert witness to state his opinion of the defendant's credibility. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, — U.S. —, 115 S. Ct. 2634, 132 L. Ed. 2d 873, rehearing denied, — U.S. —, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Defendant failed to show prejudice. State v. Wagner, 343 N.C. 250, 470 S.E.2d 33 (1996).

Testimony of what defendant's brothers said should not have been admitted because the brothers' state of mind was not relevant and could not be used to show defendant's state of mind, but the defendant failed to demonstrate that a reasonable possibility existed that, had this evidence been excluded, a different result would have been reached at trial. State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (1996).

Giving of Limiting Instructions Did Not Constitute Expression of Opinion by Judge. — Where, in prosecution for conspiracy to commit burglary, second-degree burglary, robbery with a dangerous weapon, and first-degree murder, the defendant objected to co-conspirator's admissions, and the trial court gave a limiting instruction, the giving of limiting instructions did not constitute an impermissible expression of opinion by the trial court, where the defendant did not object to the instructions, nor does he contend on appeal that the instructions were incorrect, except for the contention that the instructions constituted an impermissible expression of opinion, and he did not establish a reasonable possibility that, absent the error, a different result would have been reached at trial. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

It was not prejudicial error for the prosecuting attorney to argue that the medical expert was paid for testifying when there was no evidence that the medical expert had been paid anything because it is well known that physicians are paid for their work, and the fact that the medical expert might have been paid need not imply that he would not testify truthfully; therefore, the defendant did not show there was a reasonable possibility there would have been a different result if the argument had not been made. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

Erroneous Admission of Expert Testimony on Premeditation. — Where defendant's state of mind at the time of the killing was the central issue of the case, and without the challenged testimony of the State's expert, the only testimony going to the mens rea of first degree murder was lay opinion testimony that defendant knew right from wrong, and the contradictory testimony of three experts called by defendant regarding defendant's ability to plan or to form specific intent, the error in allowing State's expert testimony that defendant was capable of premeditating was compounded by the State's argument to the jury and was not harmless error. Accordingly, defendant was entitled to a new trial on the first degree murder charge. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Admission of Crime Scene Sketches. — Although defendant failed to request a limiting instruction at the time sketches were introduced, the trial court nevertheless gave such an instruction in its charge to the jury. Any error in admitting the sketches into evidence was harmless beyond a reasonable doubt.

State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

No Error Where Photograph Admitted Did Not Lead Jury to Believe It to Be a Mug Shot. — The trial court did not abuse its discretion in allowing the officer to testify that during the course of her investigation she identified a photograph of the defendant, where it lent credence to her subsequent identification of him at trial, and a careful review of the record revealed no evidence that would have led the jury to believe that the photograph was a mug shot. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Police Documents Identifying Defendant as Murder Suspect Nonprejudicial. — Trial judge did not err by allowing jurors to see documents from the Police Department, S.B.I. and F.B.I., which identified defendant as the suspect in murder. It seems obvious that any criminal defendant standing trial before a jury is, by definition, a suspect in the case. Thus, even assuming error, defendant could not demonstrate that he suffered prejudice. State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992).

Exclusion of Cumulative Evidence. — Court's refusal to permit witness to testify that, based upon his personal knowledge of the State's only eyewitness, he would not believe the State's witness under oath, where immediately before that evidence was offered, that witness testified without objection that in his opinion the State's witness was a liar and that he had told him he would take a bribe to change his testimony, was not prejudicial, as the refused evidence was cumulative. State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

The jury had before it sufficient evidence to evaluate witness's credibility, including proof of bias, and no reasonable possibility existed that a different result would have been reached had testimony been allowed in response to other questions; hence, the error in excluding this testimony was harmless. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, — U.S. —, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Admission of Improper Testimony Held Harmless Error. — Even if admitting evidence of murder defendant's involvement with martial arts activities and his interest in, and possession of weapons was error, it was harmless error in light of other evidence presented at trial; victim was shot three times by a .22 rifle which had to be reloaded each time before the next shot could be fired and defendant was heard to state that he wanted to "finish off" the victim after the victim had already been shot. State v. McElroy, 326 N.C. 752, 392 S.E.2d 67 (1990).

Admission of Hearsay Testimony Held Harmless Error. — Failure of the trial court to determine specifically that murder victim's statement to her attorney was not covered by any explicit exception to the hearsay rule was error, but the error was harmless where the evidence of defendant's guilt was overwhelming. State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990).

Even if a murder defendant's allegation that certain testimony allowed by the court constituted inadmissible hearsay was correct, the evidence was of so little probative value when compared to the overwhelming competent evidence of defendant's guilt, the testimony did not contribute evidence of defendant's guilt and thus, any error in admitting the testimony was harmless. State v. Warren, 327 N.C. 364, 395 S.E.2d 116 (1990).

In light of strong and unequivocal evidence of direct threats against a woman, made by the defendant while she was in his presence and he was armed with a firearm, there was no reasonable possibility that admitting the opinion testimony of a security guard, who testified that defendant "said something else to me that indicated to me that he was planning to shoot a woman," affected the result reached by the jury at trial. Therefore, any error in the admission of this testimony was harmless. State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (1993).

Defendant could not assign error to hearsay testimony which he elicited. State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996).

Harmless Error Where Defendant's Testimony Contradicted Proffered Instruction. — The trial court's failure to instruct the jury on defendant's law-abidingness and not using drugs was not prejudicial to defendant where defendant's own testimony contradicted testimony of witness that defendant was law-abiding and where there was very strong evidence of defendant's guilt. State v. Moreno, 98 N.C. App. 642, 391 S.E.2d 860 (1990).

Admission of Written Statement Contradictory Testimony. — Where the defendant argued that a witness' written statement contradicted her trial testimony and was, therefore, inadmissible as corroborative evidence, assuming arguendo that the written statement contradicted her trial testimony and was not corroborative, its admission into evidence was harmless. State v. Farmer, 333 N.C. 172, 424 S.E.2d 120 (1993).

Defendant failed to show that the trial court abused its discretion in granting the prosecution's pretrial motion for consolidation, where the defenses of the defendants were not antagonistic, and this was not a case in which testimony was received in evidence against one of the defendants that would not have been admissible had their trials not been consolidated. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

No Abuse of Discretion Where Burden of Proof Argument Subject to Different Interpretations. — Where the state objected to defendant's closing argument on the basis that it implied that the state bore the burden of disproving the insanity defense, but defense contended that its argument properly stated that the state bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder, it was held that the argument was reasonably subject to either interpretation, and therefore, the trial court did not abuse its discretion by sustaining the state's objection. See State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Receipt of Lesser of Two Sentences. — Upon defendant's conviction of first degree murder, he could only be sentenced to death or life imprisonment and he received a life sentence, the less severe of the permissible options; therefore he could not have been prejudiced by the failure of the trial court to grant a motion for mistrial directed only to the sentencing phase. State v. Darden, 323 N.C. 356, 372 S.E.2d 539 (1988).

Denial of Defendant's Motion to Produce Handwriting Analyses. — Although it was arguably error to deny defendant's motion to produce the results of analyses of a state's witness' handwriting, nevertheless, there was no error where defendant made no showing that the trial court's ruling affected the preparation or presentation of his defense, to his prejudice. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Harmless Error Where Jury Not Tainted By Television Broadcast. — Any error which may have been committed by the court was harmless beyond a reasonable doubt, where the court, in order to be certain that the jury was not tainted by television broadcast, examined each of the jurors and alternates in chambers with only a court reporter present. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

Prosecutor's Misstatement of Testimony. — Where prosecutor misstated a witness' testimony while examining defendant, the misstatement was not harmful because the defendant denied that the witness had testified as stated by the prosecutor and denied that the witness' testimony was truthful. State v. Warren, 327 N.C. 364, 395 S.E.2d 116 (1990).

Prosecutor's Questioning of Murder Defendant's Mother Held Harmless Error. — Prosecutor's questioning of capital murder defendant's mother about locks placed on the outside of defendant's bedroom door was highly prejudicial and of no probative value; however such error was harmless where the question of defendant's guilt was strong, the trial court properly sustained defendant's objections to the questions and the mother testified she was not afraid of her son. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Disallowing Questions About Defendant's Background and Character. — The trial court was correct in not allowing the questions about family history and mental illness without a foundation establishing whether defendant's mental illness was hereditary; where the same or similar evidence was admitted through other witnesses, no prejudice resulted from disallowing a witness' testimony about defendant's background and character. State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (1995).

Admission of Defendant's Differing Statements as to His Whereabouts Held Harmless. — Although the trial record did not contain the findings required by subsection (d) of § 7A-595, admission of defendant's statement at trial was not prejudicial because it was not inculpatory. It merely gave somewhat differing versions of the defendant's whereabouts on the day in question. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Admission of Defendant's Illegally Obtained Confession Was Harmless Error. — Defendant's decision to testify in rape case was induced by the strength of the State's evidence and not by the erroneous admission of defendant's statement; therefore, the State met its burden of showing that the erroneous admission of defendant's illegally obtained confession constituted harmless error. State v. Easterling, 119 N.C. App. 22, 457 S.E.2d 913 (1995).

Harmless Error Occurred Where Defendant Invited Error. — Where defense counsel elicited an in-custody statement made by defendant on cross-examination of an SBI agent and did not object to its admission at trial, the error was invited and defendant could not complain of error on appeal. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

Overwhelming Evidence of Defendant's Guilt. — Error in overruling defendant's objection and allowing the State to cross-examine defendant about statements was harmless where the evidence of defendant's guilt was overwhelming. State v. Shannon, 117 N.C. App. 718, 452 S.E.2d 825 (1995).

Given the overwhelming evidence of defendant's guilt and because the prosecutor's remarks were made in anticipation of contrasting biblical arguments actually made by defendant, any error was harmless beyond a reasonable doubt. State v. Barrett, 343 N.C. 164, 469 S.E.2d 888 (1996).

Error Held Harmless. — In light of the substantive and corroborative testimony from other witnesses, defendant did not demonstrate a reasonable possibility that a different result would have been reached absent the admission of the disputed portion of sexual abuse expert's testimony in a trial for committing indecent liberties with a child; the error was therefore harmless. State v. Quarg, 334 N.C. 92, 431 S.E.2d 1 (1993).

Where, although relevant testimony as to defendant's sanity was excluded, the defendant was able to elicit substantial evidence of a similar nature which tended to negate the defendant's capacity to understand the nature of his acts and the difference between right and wrong in relation thereto, there was not a reasonable possibility that, had the error not been committed in excluding this cumulative evidence, there would have been a different result; this was harmless error. State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993).

Even though admission of diary entry was error, there was no reasonable possibility that the admission of the diary entry affected the jury's verdict that defendant was guilty of first-degree murder. State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994).

IV. RIGHTS UNDER FEDERAL CONSTITUTION.

The proper standard of reversal in reviewing violations under N.C. Const., Art. I, § 23 of defendant's right to be present at all stages of his capital trial is the rigorous standard prescribed for review of violations of defendant's right to be present at trial under the federal Constitution. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Overwhelming Evidence Held to Render U.S. Const., Amend. IV Violation Harmless. — Where trial court erred in denying defendant's motion to suppress evidence obtained from warrantless seizure of his automobile, error was harmless beyond a reasonable doubt since evidence presented at voir dire showing defendant guilty of crimes charged was overwhelming, where defendant admitted in his initial meeting with police that he had been wearing a Dracula costume the night before, where victim positively and unwaveringly identified defendant both in pre-trial photographic showing and at the voir dire hearing, and where defendant confessed to crimes. State v. Russell, 92 N.C. App. 639, 376 S.E.2d 458 (1989).

Because failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity is a violation of both our statute and the Eighth Amendment, the standard for determining prejudice is subsection (b), which provides that violation of defendant's federal constitutional rights is prejudicial unless the State can demonstrate on appeal that it was harmless beyond a reasonable doubt. State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994).

§ 15A-1444. When defendant may appeal; certiorari.

(a) A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.

(a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

(1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

(2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

(b) Procedures for appeal from the magistrate to the district court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(c) Procedures for appeal from the district court to the superior court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

(e) Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

(f) The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division. (1977, c. 711, s. 1; 1979, c. 760, s. 3; 1981, c. 179, ss. 8, 9; 1993, c. 538, s. 27; 1994, Ex. Sess., c. 24, s. 14(b).)

Editor's Note. —

Session Laws 1993, c. 538, s. 27, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Legal Periodicals. —

For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

This section provides the exclusive statutory authority for appeals in criminal proceedings. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

Reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

The Fair Sentencing Act does not allow appeal, etc. —

In accord with the main volume. See State v. Hardy, 104 N.C. App. 226, 409 S.E.2d 96 (1991).

A defendant who has been found guilty is entitled under subsection (a1) to appellate review of the issue of whether his sentence is supported by the evidence presented at trial or during the sentencing hearing. The reviewing court must also determine whether the trial court abused its discretion in weighing the aggravating and mitigating factors. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Writ of Certiorari Available to Defendant Not Entitled to Appeal Sentence. — Pursuant to subsection (a1) of this section, a defendant who had entered a plea of guilty to a felony was not entitled to appeal as a matter of right unless his sentence exceeded the presumptive term set by former § 15A-1340.4; however, he could petition for review of the issue by writ of certiorari. State v. Farrior, 117 N.C. App. 429, 451 S.E.2d 332 (1994), cert. granted, 340 N.C. 116, 455 S.E.2d 663 (1995).

No Appeal from Interlocutory Order in Criminal Proceeding Absent Statutory Provision. — In light of the legislature's enactment of subsection (d) of this section and the North Carolina Supreme Court's decision in State v. Henry, 318 N.C. 408, 348 S.E.2d 593 (1986), the court of appeals has concluded that the statutory basis, § 1-277, for the holding in State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965) (per curiam), and dictum in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972), is no longer relevant to the appeal of interlocutory orders in criminal proceedings; accordingly, the court of appeals would decline to follow. State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984); State v. Montalbano, 73 N.C. App. 259, 326 S.E.2d 634, cert. denied, 313 N.C. 608, 332 S.E.2d 182 (1985); and State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987), insofar as they might allow interlocutory appeals in criminal proceedings based on Childs, Bryant, or § 1-277. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Denial of defendant's motion to dismiss, which was based on double jeopardy grounds, was an interlocutory order from which no appeal would lie in absence of statutory provision. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

No Conflict with § 7A-27(a). — There is no conflict between subsection

(e) and § 7A-27(a). State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990).

Appeal dismissed because defendant was not entitled to appellate review as a matter of right under subsection (a1). State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437, cert. denied, 338 N.C. 523, 452 S.E.2d 823 (1994).

Where defendant pleaded guilty to being an habitual felon, and did not move in the trial court to withdraw his guilty plea, defendant was not entitled to an appeal of right from the trial court's ruling. State v. Young, 120 N.C. App. 456, 462 S.E.2d 683 (1995).

Since the court was not required under § 15A-1340.4(b) to make findings of aggravating and mitigating factors to support the sentence imposed, defendant had no appeal as of right pursuant to subsection (a1). State v. Washington, 116 N.C. App. 318, 447 S.E.2d 799 (1994).

Applied in State v. Hester, 93 N.C. App. 594, 378 S.E.2d 553 (1989); State v. Golden, 96 N.C. App. 249, 385 S.E.2d 346 (1989); State v. Maye, 104 N.C. App. 437, 410 S.E.2d 8 (1991); State v. O'Neal, 116 N.C. App. 390, 448 S.E.2d 306, cert. denied, 338 N.C. 522, 452 S.E.2d 821 (1994).

Quoted in State v. Absher, 329 N.C. 264, 404 S.E.2d 848 (1991); State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993).

Cited in State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989); State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990); State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993); State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996); State v. McBride, 120 N.C. App. 623, 463 S.E.2d 403 (1995).

§ 15A-1445. Appeal by the State.

(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

(2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.

(3) When the State alleges that the sentence imposed:

a. Results from an incorrect determination of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level;

c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

d. Imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.

(b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979. (1977, c. 711, s. 1; 1993, c. 538, s. 28; 1994, Ex. Sess., c. 14, s. 28.)

Editor's Note. — Session Laws 1993, c. 538, s. 28, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 1994, Extra Session, c. 14, s. 28, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

CASE NOTES

I. General Consideration.
II. Appealable Orders and Judgments.

I. GENERAL CONSIDERATION.

Quoted in State v. Monroe, 102 N.C. App. 567, 402 S.E.2d 850 (1991).

Stated in State v. Monroe, 330 N.C. 433, 410 S.E.2d 913 (1991).

Cited in State v. Parsons, 92 N.C. App. 175, 374 S.E.2d 123 (1988); State v. Pakulski, 95 N.C. App. 517, 383 S.E.2d 442 (1989); State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994); State v. Hatcher, 117 N.C. App. 78, 450 S.E.2d 19 (1994), appeal dismissed, cert. denied, 339 N.C. 618, 454 S.E.2d 261 (1995); State v. Munsey, 342 N.C. 882, 467 S.E.2d 425 (1996).

II. APPEALABLE ORDERS AND JUDGMENTS.

Dismissal of Criminal Charges. — Subsection (a) clearly provides that the State may appeal the dismissal of criminal charges only when further prosecution would not be barred by the rule against double jeopardy. State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610, cert. denied, 337 N.C. 805, 449 S.E.2d 751 (1994).

§ 15A-1446. Requisites for preserving the right to appellate review.

CASE NOTES

Subdivision (d)(5) Inconsistent with N.C.R.A.P., Rule 10(b)(2). — Insofar as subdivision (d)(5) of this section allows a party to raise arguments regarding the sufficiency of the evidence to support a finding of fact at sentencing, it is inconsistent with the spirit and purpose of Rule N.C.R.A.P., 10(b)(2) and statutes which are in conflict with the Rules of Appellate Procedure are ineffective. State v. Bradley, 91 N.C. App. 559, 373 S.E.2d 130 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 798, cert. denied, 324 N.C. 114, 377 S.E.2d 238 (1989).

Effect of Failure to Note Exceptions. — Assuming arguendo that State's comment in its opening remarks regarding defendant's prior conviction was inappropriate, it was incumbent upon defendant to timely bring the alleged error to the attention of the court; by failing to do so, defendant deprived the court of the opportunity to appropriately rectify the alleged error, deprived the State of the opportunity to take the proper measures to correct its alleged error, and deprived the jury of the opportunity to hear the evidence, from the beginning, in the clear light of a trial unclouded by the alleged error. State v. Smith, 96 N.C. App. 352, 385 S.E.2d 808 (1989).

Failure to Note Exceptions, etc. — In accord with third paragraph in the main volume. State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

Defendant failed to object to the admission of testimony at trial. A failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal. State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

An assignment of error ordinarily will

not be considered on appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Except in Capital Cases. —

In trial for murder and robbery, although defendant failed to properly object to State's use of peremptory challenges which, under this rule, would normally have precluded appellate review of the issue, the Supreme Court nevertheless would consider defendant's argument, noting that defendant was tried prior to a retroactively effective United States Supreme Court decision upon which defendant based his argument on appeal, that defendant had raised the issue initially by motion at trial, and that defendant was on trial for his life. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Benefit of Objection Lost, etc. —

Defendants waived exceptions at issue when witness testified to substantially the same effect on other occasions without objection. Polk v. Biles, 92 N.C. App. 86, 373 S.E.2d 570 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 798 (1989).

Where during the voir dire hearing on a motion to suppress a confession, reference to the arrest warrant was repeatedly made, and defendant never objected or gave any indication that the legality of the arrest would be challenged upon appeal, the defendant could not on appeal for the first time attempt to raise the issue of his arrest as a basis to overturn the ruling of the trial judge. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Exception to the admission of testimony is waived when testimony of the same import is admitted without objection. State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

Where a relevant response was not apparent from the context of the examination, defendant was precluded from predicating error upon the trial court's ruling on the State's objection to the question. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

Objection to Exclusion of Evidence. —

Where the relevance of the proffered evidence was not "obvious from the record," and defendant did not make an offer of proof showing the substance of what the witness would have testified, defendant's question regarding the admissibility of the evidence would not be reviewed on appeal. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Defendant did not attack the admission of his out-of-court statements on the ground of unlawful arrest, but attacked the voluntariness of them; therefore, defendant could not arise the issue of his alleged unlawful arrest for the first time on appeal. State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

Before granting a new trial to a defendant under the plain error rule, the appellate court must be convinced that absent the alleged error, a jury probably would have reached a different verdict. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Plain Error Rule May Allow Relief Without Objection. — On rare occasions the "plain error" rule may allow a party relief even though no objection was made. Before relief will be granted under the "plain error" rule, however, the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988).

Right to Appeal Waived by Insufficient Record. — Where the trial judge, upon plaintiff's objection, excluded testimony of defendant's expert witness which the defendant had attempted to elicit at trial, and where defendant made no offer of proof, and the record failed to disclose what the substance of the expert's evidence might have been, defendant waived its right to assert issue on appeal since the essential substance of the witness' testimony was not discernible from the record. River Hills Country Club, Inc. v. Queen City Automatic Sprinkler Corp., 95 N.C. App. 442, 382 S.E.2d 849 (1989).

Waiver Shown. — Where defendant gave notice of intent to appeal following suppression hearing in August, but did not give notice of appeal until April, judgment having been entered a week earlier, since defendant failed to make an appropriate and timely motion in the trial court, he waived his right to assert motions regarding new evidence on appeal, pursuant to this section. State v. Smothers, 108 N.C. App. 315, 423 S.E.2d 824 (1992).

Applied in State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990); State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991); State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Canady, 330 N.C. 398, 410 S.E.2d 875 (1991); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Swann, 115 N.C. App. 92, 443 S.E.2d 740 (1994).

Stated in State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995).

Cited in State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988); State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988); State v. Simpson, 327 N.C. 178, 393 S.E.2d 771 (1990); State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990); State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991); State v. Barnes, 333 N.C. 666, 430 S.E.2d 223, cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993); State v. Adams, 335 N.C. 401, 439 S.E.2d 760 (1994); State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995).

§ 15A-1447. Relief available upon appeal.

CASE NOTES

When judgment is arrested on predicate felonies in a felony murder case to avoid a double jeopardy problem, the guilty verdicts on the underlying felonies remain on the docket and judgment can be entered if the conviction for the murder is later reversed on appeal and the convictions on the predicate felonies are not disturbed upon appeal. State v. Pakulski, 326 N.C. 434, 390 S.E.2d 129 (1990).

§ 15A-1448. Procedures for taking appeal.

(a) Time for Entry of Appeal; Jurisdiction over the Case. —

(1) A case remains open for the taking of an appeal to the appellate division for the period provided in the rules of appellate procedure for giving notice of appeal.

(2) When a motion for appropriate relief is made under G.S. 15A-1414 or G.S. 15A-1416(a), the case remains open for the taking of an appeal until the court has ruled on the motion. The time for taking an appeal as provided in subsection (b) shall begin to run immediately upon the entry of an order under G.S. 15A-1420(c)(7), and the case shall remain open for the taking of an appeal until the expiration of that time.

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.

(4) Repealed by Session Laws 1987, c. 624.

(5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).

(6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.

(b) How and When Appeal of Right Taken. — Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure.

(c) Certiorari. — Petitions for writs of certiorari are governed by rules of the appellate division. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 29; 1987, c. 624; 1989, c. 377, s. 5.)

Editor's Note. — Session Laws 1989, c. 377, s. 5, which amended this section, was effective July 1, 1989, and applicable to all judgments of the district or superior court entered on or after that date.

CASE NOTES

Motion Not Recognizable in Supreme Court. — At the time defendant's motion for appropriate relief was filed in the trial court the jurisdiction of the trial court had not been divested under subdivision (a)(3); the case, therefore, was not then pending in the appellate division, and the motion was not properly cognizable in the Supreme Court. State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993).

Cited in State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993).

§ 15A-1451. Stay of sentence; bail; no stay when State appeals.

CASE NOTES

Cited in Allen v. Lowder, 875 F.2d 82 (4th Cir. 1989).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

Article 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty

after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances

which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex

offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1; 1994, Ex. Sess., c. 7, s. 5; 1995, c. 509, s. 14.)

Cross References. — As to punishment for persons under the age of seventeen who are convicted of murder, see § 14-17. As to provisions relating to offenders under the age of 17, see § 14-17.

Editor's Note. —

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 123 creates the Special Capital Case Rehearing Fund, to provide resentencing hearings, related appeals, and post-conviction hearings required by the decisions of the United States Supreme Court in McKoy v. North Carolina, 494 U.S. —, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), and of the Supreme Court of North Carolina upon the remand of that case for the payment of attorney fees and related expenses for representation of indigent persons as specified in Subchapter IX of Chapter 7A, which Fund shall terminate when the Director of the Administrative Office of the Courts certifies to the State Comptroller that all reasonably foreseeable resentencing hearings, related appeals, and post-conviction hearings have been substantially completed.

Session Laws 1989 (Reg. Sess., 1990), c. 1066, s. 149 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1990-91 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1990-91 fiscal year."

Session Laws 1991, c. 742, s. 2(a), provides: "There is continued in the Judicial Department the nonreverting special fund known as "The Special Capital Case Rehearing Fund." The funds shall be used to provide for related expenses in connection with resentencing hearings, related appeals, and post-conviction hearings required by the decisions of the United States Supreme Court in McKoy v. North Carolina, March 5, 1990, and of the Supreme Court of North Carolina upon the remand of that case, including the payment of attorneys' fees and related expenses for representation of indigent persons. The Special Capital Case Rehearing Fund shall terminate, and all funds remaining in it shall revert to the General Fund, when the Director of the Administrative Office of the Courts certifies to the State Controller that all reasonably foreseeable resentencing hearings, related appeals, and post-conviction hearings have been substantially completed."

Session Laws 1993 c. 321, s. 195(a) provides: "Notwithstanding the provisions of Section 78 of Chapter 689 of the 1991 Session Laws, the Judicial Department may transfer up to the sum of one million one hundred thousand dollars ($1,100,000) from the Special Capital Case Rehearing Fund, established in Section 2 of Chapter 742 of the 1991 Session Laws, to the Indigent Persons' Attorney Fee Fund by June 30, 1994, to pay the obligations incurred by the Indigent Persons' Attorney Fee Fund."

Session Laws 1993, c. 321, s. 321 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1994 (Extra Session), c. 22, s. 29, effective March 26, 1994, authorizes the Juvenile Code Committee of the Legislative Research Commission to study the transfer of jurisdiction of juveniles who have committed certain offenses from district court to superior court for trial as adults and requires the submission of a final report to the 1995 General Assembly.

Session Laws 1994, Extra Session, c. 24, s. 45 provides for the Department of Correction, the Department of Crime Control and Public Safety, and the Department of Justice to study the effect on the criminal justice system of having the sentence of life imprisonment without parole for certain criminal offenses and to also consider whether the sentence has served as a deterrent with regard to those crimes for which it may be imposed, any other impact the sentence may have had on the crime rate, its fiscal impact, and projected costs if the sentence continues to be imposed. The findings and recommendations are to be reported by January 1, 2005.

Session Laws 1994, Extra Session, c. 24, s. 70, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

Session Laws 1994, Extra Session, c. 7, s. 5, which amended this section, was effective May 1, 1994, and applicable to offenses committed on or after that date.

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted "B1, B2" for "B" in subdivision (e)(3).

Legal Periodicals. —

For note, "Mercy Killing and Malice in North Carolina," see 66 N.C.L. Rev. 1160 (1988).

For note, "Sifting Through the Fallout of North Carolina's Death Penalty Jurisprudence: Getting Down to the Real McKoy," see 69 N.C.L. Rev. 1504 (1991).

For note, "State v. Jennings: Public Fervor, the North Carolina Supreme Court, and Society's Ultimate Punishment," see 72 N.C.L. Rev. 1672 (1994).

For note, "Arbitrariness and the Death Penalty in an International Context", see 45 Duke L.J. 611 (1995).

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I. GENERAL CONSIDERATION.

Editor's Note. *— The annotation to the case of State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), cited in the main volume under the catchline "Finding of Aggravating or Mitigating Circumstance Must Be Unanimous", should be disregarded insofar as it imposes a unanimity requirement for the finding of mitigating circumstances, in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).*

Constitutionality, etc. —

In accord with fourth paragraph in the main volume. See State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The North Carolina Supreme Court reaffirmed its position that the North Carolina death penalty statute does not violate the U.S. Const., Amends. VIII and XIV or N.C. Const., Art. I, §§ 19 and 27. State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993), cert. denied, — U.S. —, 114 S. Ct. 1577, 128 L. Ed. 2d 220 (1994).

The North Carolina death penalty statute is neither unconstitutionally vague nor overbroad and is not applied in a discriminatory and discretionary manner. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

The holding in McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), did not invalidate North Carolina's capital sentencing statute or any part thereof; at most the decision invalidated only those jury instructions requiring unanimity on mitigating circumstances in a capital sentencing proceeding, and because the invalidated jury instructions amount only to trial error and do not arise from any deficiency inherent in the statute itself, the statute remains constitutional and in full force and effect. State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).

There is no constitutional infirmity in the use of the word "duty" in jury instructions to explain the jury's responsibility to act after it has unanimously made the statutory findings during the sentencing phase of the trial. McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990), cert. denied, 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009, 502 U.S. 922, 112 S. Ct. 334, 116 L. Ed. 2d 274 (1991).

The rights guaranteed by this section, etc. —

General statistical studies of the operation of the death penalty, showing that a person is more likely to be executed if the murder victim is white and the chance is more likely yet if the defendant is black, could not be used by defendant to show a violation of his rights under U.S. Const., Amends. VIII and XIV or under N.C. Const., Art. I, § 19. State v. Green, 329 N.C. 686, 406 S.E.2d 852 (1991).

Unanimity Requirement for Finding of Mitigating Factors Unconstitutional. — The unanimity requirement in North Carolina's capital sentencing scheme, which prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find, violates the federal Constitution by preventing the sentencer from considering all mitigating evidence. McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Each juror must be allowed to consider all mitigating evidence in deciding whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to justify a sentence of death. Such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance. McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

But there is no constitutional requirement that a juror must consider a mitigating circumstance found by another juror to exist. What is constitutionally required is that jurors be individually given the opportunity to consider and give weight to whatever mitigating evidence they deem to be valid. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

A state may not limit a sentencer's consideration of mitigating evidence merely because it places the same limitation on consideration of aggravating circumstances. McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence presented during the guilt determination phase of a capital case is competent and admissible as a matter of law during a capital sentencing proceeding in the same case; therefore evidence recorded from defendant's prior trial was properly admitted where witness asserted his privilege against incrimination. State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995), cert. denied, — U.S. —, 116 S. Ct. 956, 133 L. Ed. 2d 879 (1996).

Duty of Prosecution. — The prosecutor has a duty to strenuously present the state's case, to use every legitimate means to bring about a just conviction and, in a capital case, that duty may be extended to present arguments for the sentence of death. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, — U.S. —, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

This section does not mandate the death penalty, and it does not limit the sentencer's consideration of any relevant information offered by the defendant. McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990), cert. denied, 501 U.S. 1223, 111 S. Ct. 2840, 115 L. Ed. 2d 1009, 502 U.S. 922, 112 S. Ct. 334, 116 L. Ed. 2d 274 (1991).

Constitutionality of Instruction on Weighing of Factors. — Court's instructions that the jury must recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and if it found that the aggravating circumstances were sufficiently substantial to call for the death penalty when considered with the mitigating circumstances did not impair the jury's fair consideration of evidence in mitigation of the crime. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Legislative Intent in Specifying Aggravating Circumstances. — By enacting specific aggravating circumstances to be considered in capital sentencing, the legislature intended that a jury having found one of those statutory aggravating circumstances to exist must give it some weight in aggravation when determining the appropriate sentence to recommend. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Maryland Statute Compared. — North Carolina capital sentencing procedure differs significantly from Maryland's sentencing scheme which the Supreme Courts in Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) declared unconstitutional, and the North Carolina capital-sentencing procedure conforms with federal constitutional requirements. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Section 15A-1334—not a part of Article 100—has no application to capital sentencing proceedings which are conducted pursuant to § 15A-2000. This, the only remnant of the common law right of allocution remaining in capital cases, is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, — U.S. —, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

The Fair Sentencing Act was inapplicable where the defendant was sentenced under this section for convictions of three counts of first-degree murder, and not under the Fair Sentencing Act. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

"Death Qualified" Jury Constitutional. —

Jurors' affirmative response to the question "Is your view of the death penalty such that it would prevent or substantially impair your performing your sworn duties as a juror?" was a valid basis for allowing the prosecutor's challenge for cause, where potential jurors had been indoctrinated by the court and prosecution into the nature of their responsibilities. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

A state may use its peremptory challenges to purge a jury of veniremen not excludable for cause under Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1967), for scruples about the death penalty. Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

It was neither constitutionally nor otherwise improper for the prosecution to use its challenges to excuse potential jurors who were not excludable for cause but who expressed qualms or some hesitancy about their ability to impose the death penalty. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

The defendant is not allowed to rehabilitate a juror who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Jurors Properly Excused for Cause. — A trial court may excuse for cause a prospective juror whose views regarding the death penalty would prevent or substantially impair the performance of his duty as a juror, and thus where two potential jurors clearly expressed several times that they could not vote for the death penalty under any circumstances, the trial court properly could have concluded that their subsequent equivocation arose out of their desire to perform their duties as jurors according to the dictates of the law and excused them for cause. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

The prosecutor's statements regarding the sentencing phase of defendant's first-degree murder trial, made during jury selection, simply referred to the conditional nature of bifurcated capital prosecutions mandated by this section, and nothing in the statements themselves suggested the prosecutor was attempting to place before the venire prejudicial matters by injecting his own beliefs or personal opinions. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Jury Not Allowed to Disregard Circumstances. — Allowing the jury the discretionary power to completely disregard those circumstances specifically enumerated by the legislature and found from the evidence to exist — whether aggravating or mitigating circumstances — would return the sentencing proceedings in capital cases to the realm of unguided jury discretion, rendering any resulting death sentences constitutionally suspect. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Involvement of Co-defendants. — That capital sentencing must focus on the individual defendant, his crimes, personal culpability, and mitigation, does not also mean that no mention may be made of a co-defendant actively involved at the scene of the crime. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Duty of Jury, etc. —

Under subsection (b) of this statute, the jury is required to consider aggravating factors and mitigating circumstances and then to determine whether the defendant should be sentenced to death or imprisonment in the State's prison for life. These are the only alternatives allowed the jury. Other comments or notations on the verdict sheet are irrelevant. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Failure of Jury to Show Weighing of Mitigating and Aggravating Circumstances. — A writing returned by the jury which fails to specifically show that the jury has determined that the mitigating circumstances are insufficient to outweigh the aggravating circumstances found will not support a sentencing recommendation or sentence in a capital case. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48 (1990).

Jury Intervention Required. — The death penalty statute does not permit a defendant to plead guilty to first-degree murder and by prearrangement with the State be sentenced to life imprisonment without the intervention of a jury. State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994).

Argument by prosecutor that the only way the jury could prevent defendant from killing again was to give him the death penalty was not improper. State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994), cert. denied, — U.S. —, 115 S. Ct. 2599, 132 L. Ed. 2d 845 (1995).

When Instruction on Eligibility for Parole Required. — The United States Supreme Court has held that in a capital sentencing proceeding where the state law provides that a defendant sentenced to life imprisonment will not be eligible for parole, it is violative of due process to deny defendant's request for a jury instruction that under state law defendant, if sentenced to life imprisonment, would not be eligible for parole; however, this holding is limited to those situations where the alternative to a sentence of death is life imprisonment without possibility of parole. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, — U.S. —, 115 S. Ct. 2566, 132 L. Ed. 2d 818 (1995).

Questioning of Prospective Jurors Regarding Parole. — Because defendant could have been eligible for parole, no questioning of prospective jurors during sentencing phase regarding parole eligibility was required to satisfy due process. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, — U.S. —, 115 S. Ct. 2566, 132 L. Ed. 2d 818 (1995).

A juror properly may give a nonstatutory circumstance no weight even if the juror finds the circumstance to exist. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Jury Decision Must Be Based on Considerations in Subsection (b). — Defense counsel acted improperly where he urged the jurors to base their decision on reasons not based on the mitigating and aggravating evidence presented at the sentencing proceeding. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, — U.S. —, 115 S. Ct. 2566, 132 L. Ed. 2d 818 (1995).

Individual Poll Required. — Trial court, in questioning the jury collectively and having all members of the jury respond collectively, failed to meet the statutory mandate that the jury be polled individually. State v. Buchanan, 330 N.C. 202, 410 S.E.2d 832 (1991).

The order and form of the issues, etc. —

In accord with the main volume. See State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Thoughtful and full deliberation in an effort to achieve unanimity has only a salutary effect on our judicial system: It tends to prevent arbitrary and capricious sentence recommendations. State v. McCarver, 341 N.C. 426, 462 S.E.2d 25 (1995).

Concession of Guilt and of Aggravating Factors by Defense Counsel. — Statements of defendant's lawyer during penalty phase of capital murder case which involved a concession of guilt and of the existence of two aggravating circumstances did not reflect errors so serious as to have deprived defendant of counsel in the sense of U.S. Const., Amend. VI. Brown v. Dixon, 891 F.2d 490

(4th Cir. 1989), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

Defendant's statements to victim concerning his crimes against another victim, if relevant, were admissible pursuant to § 8C-1, Rule 801(d) and were relevant because they tended to show that the murder was especially heinous, atrocious, or cruel and tended to show the murder was part of a cause of conduct. State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994), cert. denied, — U.S. —, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994).

Denial of Motion to Impose Life Sentence After Seven Hours of Deliberation. — The trial court did not err in denying defendant's motion to impose a life sentence in a capital murder case after the jury had deliberated for seven hours where the jury was considering three separate cases, one of which required consideration of two aggravating and six mitigating factors; another required four aggravating and six mitigating factors; and the third required consideration of three aggravating and six mitigating factors. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence of Aggravating Circumstances. — The death penalty statute does not permit the State to recommend to the jury during the sentencing proceeding a sentence of life imprisonment when the State has evidence from which a jury could find at least one aggravating circumstance beyond a reasonable doubt. State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994).

Definition of a Capital Felony. — The General Assembly, when it defined capital felony under this section, meant a crime for which the defendant could receive the death penalty. State v. Bunning, 338 N.C. 483, 450 S.E.2d 462 (1994).

Instruction on Weighing Factors, etc. —

Although evidence may support the existence of a nonstatutory circumstance, the jury may decide that it is not mitigating; therefore, the court did not err in denying defendant's requested instruction that if the jury found any nonstatutory mitigating circumstances, it must give them some mitigating value. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instruction as to When Jury Must Recommend, etc. —

Jury instruction was not unconstitutional where it imposed on the jury a duty to return a recommendation of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instruction on Parole Eligibility. — Where under the law applicable at the time of defendant's trial, he would have been eligible for parole if given a life sentence, the trial court was neither required nor allowed to give an instruction on the issue of parole eligibility. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Scope of Argument, etc. —

In a capital murder case, the court's failure to intervene ex mero motu in the district attorney's sentencing argument was not an abuse of discretion where the district attorney properly stated the law in arguing that the sentence was not purely a matter for the jury's discretion, even though the prosecutor read verses from the Bible which stated a murderer shall be put to death. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial Court's Refusal to Impanel Second Jury Held Appropriate. — Where the trial jury was able to reconvene and decide the penalty issue of a capital murder case, the trial court's refusal to impanel a second jury was entirely appropriate and constitutionally permissible. Subdivision (a)(2) of this section only provides for separate juries to hear the two phases of a capital murder case if the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused. Brown v. Rice, 693 F. Supp. 381 (W.D.N.C. 1988), rev'd on other grounds sub nom., Brown v. Dixon, 891 F.2d 490 (4th Cir. 1989), cert. denied, 495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990).

Where defendants were being jointly tried for the same capital offense, when one defendant changed his plea to guilty, it was error for the trial to continue as both a sentencing proceeding as to one defendant and as a trial to determine the guilt or innocence of the other. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

Applied in State v. Darden, 323 N.C. App. 356, 372 S.E.2d 539 (1988); State v. McKinnon, 328 N.C. 668, 403 S.E.2d 474 (1991); State v. Fullwood, 329 N.C. 233, 404 S.E.2d 842 (1991); State v. Thomas, 329 N.C. 423, 407 S.E.2d 141 (1991); State v. Brogden, 329 N.C. 534, 407 S.E.2d 158 (1991); State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991); State v. Lloyd, 329 N.C. 662, 407 S.E.2d 218 (1991); State v. Tucker, 329 N.C. 709, 407 S.E.2d 805 (1991); State v. Turner, 330 N.C. 249, 410 S.E.2d 847 (1991); State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994); State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (1994); State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995); State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995); State v. Campbell, 340 N.C. 612, 460 S.E.2d 144 (1995); State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995); State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995); State v. Carter, 342 N.C. 312, 464 S.E.2d 272 (1995); State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996).

Quoted in State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994); State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996).

Cited in State v. Loftin, 322 N.C. 375, 368 S.E.2d 613 (1988); State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989); State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989); State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989); State v. Groves, 324 N.C. 360, 378 S.E.2d 763 (1989); State v. Liles, 324 N.C. 529, 379 S.E.2d 821 (1989); State v. Outlaw, 94 N.C. App. 491, 380 S.E.2d 531 (1989); State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989); State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991); State v. McPhail, 329 N.C. 636, 406 S.E.2d 591 (1991); State v. Annadale, 329 N.C. 557, 406 S.E.2d 837 (1991); State v. McDowell, 329 N.C. 363, 407 S.E.2d 200 (1991); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992); State v. Adams, 331 N.C. 317, 416 S.E.2d 380 (1992); State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992); State v. Thomas, 332 N.C. 544, 423 S.E.2d 75 (1992); State v. Pope, 333 N.C. 116, 423 S.E.2d 746 (1992); State v. Lightner, 108 N.C. App. 349, 423 S.E.2d 827 (1992); State v. Farmer, 333 N.C. 172, 424 S.E.2d 120 (1993); State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993); State v. Sweatt, 333 N.C. 407, 427 S.E.2d 112 (1993); Noland v. Dixon, 808 F. Supp. 485 (W.D.N.C. 1992); State v. Bates, 333 N.C. 523, 428 S.E.2d 693 (1993); State v. Harris, 333 N.C. 544, 428 S.E.2d 823 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993); State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (1993); State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993); State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993); State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993); Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993); State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Sexton, 336 N.C. 321, 444 S.E.2d 879 (1994); State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994); State v. Jones, 336 N.C. 490, 445 S.E.2d 23 (1994); State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994); State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994), cert. denied, — U.S. —, 115 S. Ct. 1971, 131 L. Ed. 2d 860 (1995); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), cert. denied, — U.S. —, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995); State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994), cert. denied, — U.S. —, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995); State v. Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994), cert. denied, — U.S. —, 116 S. Ct. 111, 133 L. Ed. 2d 63 (1995); State v. Mixion, 118 N.C. App. 559, 455 S.E.2d 904 (1995); State v. Ratliff, 341 N.C. 610, 461 S.E.2d 325 (1995); State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995); State v. Montgomery, 341 N.C. 553, 461 S.E.2d 732 (1995); State v. Robinson, 342 N.C. 74, 463 S.E.2d 218 (1995); State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995); State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, — U.S. —, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996); State v.

James, 342 N.C. 589, 466 S.E.2d 710 (1996); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996); State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996); State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996); State v. Pope, 122 N.C. App. 89, 468 S.E.2d 552 (1996).

II. REVIEW OF JUDGMENT AND SENTENCE.

Errors Under McKoy v. North Carolina — Standard of Review. — At least for all trials conducted after State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983) and before Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), the Supreme Court will decline to require that a McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) error be reviewed under the plain error standard when the defendant failed to object at trial to the error, and will instead will apply N.C.R.A.P., Rule 2. State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990).

Same — State's Burden of Proof. — On appeal, the state must demonstrate that a McKoy error was harmless beyond a reasonable doubt because the error is of constitutional dimension. State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990), cert. denied, 489 U.S. 1051, 111 S. Ct. 763, 112 L. Ed. 2d 782 (1991).

Because McKoy error under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369, is of constitutional dimension, the State bears the burden of demonstrating that it was harmless beyond a reasonable doubt. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

The harmless error analysis is to be applied to the review of a unanimity instruction found to be constitutionally erroneous under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990). State v. Hunt, 330 N.C. 501, 411 S.E.2d 806, cert. denied, 505 U.S. 1226, 112 S. Ct. 3045, 120 L. Ed. 2d 913 (1992).

McKoy Error Rarely Harmless. — It would be a rare case in which a McKoy error could be deemed harmless. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Where there is evidence to support a mitigating circumstance on either of two grounds, and the jury is so instructed, an appellate court should not speculate as to which ground served as the basis of the jury's finding. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

"Finding" Required by Subdivision (d)(2). —

In accord with first paragraph in the main volume. See State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 4166, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Death sentence imposed upon defendant's conviction of the first-degree murder of his infant son was not excessive or disproportionate. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Where the court finds no error in the guilt and sentencing phases, it is required to review the record and determine: (1) Whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death; (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The fact that in one or more cases factually similar to the one under review a jury has recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994), cert. denied, — U.S. —, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

The fact that one, two, or several juries have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have consistently returned life sentences in factually similar cases, because the court independently considers the individual defendant and the nature of the crime or crimes which he has committed; therefore, single aggravating circumstance may outweigh a number of mitigating circumstances and may be sufficient to support a death sentence. State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), cert. denied, — U.S. —, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

Pool of Similar Cases Used for Comparison. —

Where case was similar to cases in which the death penalty has been affirmed, and dissimilar to cases holding the death penalty to be disproportionate and cases in which juries have recommended life sentences, sentence of death was not disproportionate. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, — U.S. —, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

After comparing this case with other cases in the proportionality pool, focusing on the defendant and the crime, the sentence of death was neither excessive nor disproportionate. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, — U.S. —, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995).

Review Held Sufficient. —

Where evidence indicated that defendant snatched 4 year old from her yard, took her to his house, raped her, strangled her, and brutally beat her to death, the case fell within the category of first-degree murders for which the death penalty has been upheld as proportionate. State v. Kandies, 342 N.C. 419, 467 S.E.2d 67 (1996).

The record fully supported the two aggravating circumstances found by the jury and there was no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. State v. Barrett, 343 N.C. 164, 469 S.E.2d 888 (1996).

In conducting a proportionality review the Supreme Court did not find it necessary to extrapolate or analyze in its opinion all, or any particular number, of the cases in its proportionality pool. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial court had no authority to engage in proportionality review, since that duty is reserved exclusively for the Supreme Court. State v. Payne, 327 N.C. 194, 394 S.E.2d 158 (1990), cert. denied, 498 U.S. 1092, 111 S. Ct. 977, 112 L. Ed. 2d 1062 (1991).

Error in Instruction Without Effect on Sentence. — In light of trial court's entire instruction regarding defendant's impaired capacity, the jury's finding that defendant was under the influence of an emotional disturbance, and the brutality of the killing, the error in one sentence of the trial court's instruction had no probable effect on the outcome of the sentencing proceeding. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, — U.S. —, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995).

Instruction requiring unanimity in finding mitigating factors did not lead to imposition of sentence under arbitrary factor. Although the Supreme Court's decision in McKoy v. North Carolina, 494 U.S. —, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), condemned certain jury instructions with regard to sentencing and the need for unanimity concerning mitigating circumstances because of their potential for producing an arbitrary result, but where there was no showing that the potential for arbitrariness was actually realized or that defendant's death sentence resulted from arbitrariness, imposition of a life sentence was not required under subdivision (d)(2) of this section. State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).

Jury-Recommended Life Sentence Did Not Affect Capital Nature of Trial. — The fact that the jury recommended and the trial court entered a sentence of life imprisonment did not change the capital nature of that trial or his status as a capital defendant in that trial. Therefore, the unwaivable requirement of his presence applied at every stage of his trial and was violated by the trial court's private bench conferences with prospective jurors. State v. Johnston, 331 N.C. 680, 417 S.E.2d 228 (1992).

Facts held to support the jury's decision, etc. —

In accord with the first paragraph in the main volume. See State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Sentence Supported by Other Aggravating Factors Where One Factor Was Unconstitutionally Vague. — Defendant could not demonstrate a miscarriage of justice to excuse the application of the procedural bar of § 15A-1419(a), where the instruction to defendant's sentencing jury on the aggravating factor that the murder was "heinous, atrocious, or cruel" was unconstitutionally vague, because defendant remained eligible for the death penalty based on the subdivision (e)(5) aggravating factor of this section on three circumstances — defendant murdered the victim while in the process of kidnapping, robbing, and raping her. Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, — U.S. —, 115 S. Ct. 678, 130 L. Ed. 2d 678 (1995).

Death Penalty Not Appropriate. — Where a murder conviction was based solely upon the felony murder theory; it had only one aggravating circumstance, pecuniary gain; and the jury found as mitigating circumstances that defendant had no significant history of prior criminal activity, that defendant was under the influence of mental or emotional disturbance, that he confessed and cooperated upon arrest, that he voluntarily consented to a search of his motel room, car, home, and storage bin, and that he was abandoned by his natural mother at an early age; and since defendant also pleaded guilty during the trial and acknowledged his wrongdoing before the jury, the murder did not rise to the level of those cases in which the death penalty has been approved. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Sentence Held Not Excessive, etc. —

In accord with third paragraph in the main volume. See State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Quesinberry, 325 N.C. 125, 381 S.E.2d 681 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Defendant's violent history as well as his brutality and calculation in the killing and disfiguring of his victim's body and his total lack of remorse for the murder, as demonstrated by his further murders of victim's wife and her small child, fully supported the jury's recommendation of death. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where the jury found the single aggravating factor that defendant had been previously convicted of another capital felony and found no mitigating circumstances, the death sentence imposed by the jury was held not disproportionate when compared to other cases involving a prior homicide conviction. State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where defendant was involved in two premeditated and deliberated first degree murders, jury found that defendant had been convicted previously of felony involving the use of violence to person — voluntary manslaughter of his wife, and where evidence at trial showed, therefore, that defendant had killed three people, death penalty recommendation was not excessive or disproportionate to penalty imposed in similar cases. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where jury found premeditation and deliberation on defendant's part, victim was defendant's father, attack on victim was unprovoked, and defendant displayed no remorse for his act, the case rose to the level of murders in which court had approved death sentence upon proportionality review. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of

McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The death sentence was not excessive or disproportionate, considering both the crime and the defendant where the case included (1) a murder of a wife preceded by many years of physical abuse and threats to her; (2) fear on the part of the victim; (3) a calculated plan of attack by the defendant; (4) a senseless and brutal stabbing in front of other people, found to be "especially heinous, atrocious, or cruel" by the jury; (5) a period of time in which the victim suffered great physical and psychological pain before death; and (6) a distinct failure by the defendant to exhibit remorse after the killing, and where the jury found only one statutory mitigating circumstance, that the crime was committed while the defendant was under the influence of mental or emotional disturbance. State v. Syriani, 333 N.C. 350, 428 S.E.2d 118, cert. denied, 510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993), reh'g denied, 510 U.S. 1066, 114 S. Ct. 745, 126 L. Ed. 2d 707 (1994).

Death penalty upheld where defendant offered companionship to a small, trusting woman but then took her to a secluded place, where he sexually assaulted her, raped her, and brutally beat, tortured, stabbed, and strangled her until she was dead. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, — U.S. —, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Where the jury found only one aggravating circumstance, that the murder was committed for pecuniary gain, and nine mitigating circumstances, the death penalty was not disproportionate. State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994), cert. denied, — U.S. —, 115 S. Ct. 2599, 132 L. Ed. 2d 845 (1995).

Imposition of death penalty for robbery-murder of store clerk upheld on proportionality review. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

In robbery-murder case in which defendant had been previously convicted of murder in another state several years earlier and of armed robbery committed one week prior to, death sentence was not disproportionate. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, — U.S. —, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

The sentence of death recommended by the jury and ordered by the court was not disproportionate. State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (1996).

Death sentence was not disproportionate in a case involving multiple murders. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, — U.S. —, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Death sentences, imposed for two murders which defendants planned over a period of at least nine hours, apparently to avenge the loss of some jewelry the victim allegedly had taken from a relative of the defendants, were not excessive or disproportionate to the penalties imposed in similar cases. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

The court found that this case was not substantially similar to any case in which the Court had found the death penalty disproportionate in that none of those cases involved a double murder. State v. Barrett, 343 N.C. 164, 469 S.E.2d 888 (1996).

Sentence Not Imposed Under Influence of Passion, Prejudice or Other Arbitrary Consideration. — The record fully supported the aggravating circumstances found by the jury in defendant's first-degree murder trial. Further, there was no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. denied, — U.S. —, 114 S. Ct. 2784, 129 L. Ed. 2d 895, reh'g denied, — U.S. —, 115 S. Ct. 26, 129 L. Ed. 2d 924 (1994).

Life Sentence Mandatory Where Death Sentence Held Excessive and Disproportionate. — Where the court held as a matter of law that the death sentence imposed was disproportionate within the meaning of this section, the statute required that the court sentence defendant to life imprisonment in lieu of the death sentence. The language of the statute is mandatory, and the court had no discretion in determining whether the death sentence should be vacated. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

New Sentence Hearing Required. — Where the trial court's instructions and the verdict form required the jury to find unanimously the existence of each of eleven submitted mitigating circumstances, two of which were statutory, the mental or emotional disturbance circumstance, subdivision (f)(2), and the impaired capacity circumstance, subdivision (f)(6), and the jury failed to find unanimously any of the mitigating circumstances submitted, although there was substantial evidence to support at least some, if not all, of these circumstances, including those defined by statute, defendant was entitled to a new sentencing hearing. State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991).

III. AGGRAVATING CIRCUMSTANCES.

A. In General.

The Supreme Court has never found the death penalty to be disproportionate for a convicted murderer of multiple victims; in fact, that defendant is a multiple killer is a heavy factor to be weighed against the defendant. State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (1995).

A defendant is not constitutionally entitled to an enumeration of aggravating factors to be used against him; statutory notice as contained in subsection (e) of this section is sufficient. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

State May Only Rely on Subsection (e) Circumstances. —

There are four stafutory aggravating circumstances which, standing alone, the North Carolina Supreme Court has held sufficient to sustain death sentences, and the aggravator in (e)(3) is among them. State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (1996).

A prosecutor during jury voir dire should limit references to aggravating factors, including the underlying felonies listed in this section, to those of which there will be evidence and upon which the prosecution intends to rely. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Error for State to Agree Not to Submit Circumstances. — It was error for the state, via a plea bargain, to agree not to submit aggravating circumstances which could be supported by the evidence. State v. Case, 330 N.C. 192, 410 S.E.2d 57 (1991).

Where there is no evidence of an aggravating circumstance, the prosecutor may so announce, but this announcement must be based upon a genuine lack of evidence of any aggravating circumstance. State v. Case, 330 N.C. 192, 410 S.E.2d 57 (1991).

Multiple Factors Improper. — Where the trial court submitted to the jury as statutory aggravating circumstances whether a murder was committed for pecuniary gain, and whether the murder was committed while defendant was engaged in the commission of a burglary it was improper for the trial court to submit two aggravating circumstances supported by the same evidence and defendant was entitled to a new capital sentencing proceeding. State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (1994).

Poisoning Not Aggravating Circumstance. — The act of poisoning itself makes a killing first-degree murder, the fact that the poison is administered in small doses over an extended period of time thereby causing excruciating and prolonged pain and suffering was not essential to prove the offense and was properly submitted as an aggravating circumstance. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Vague Heinousness Instruction Was Harmless Error. — Appellate court conducting harmless error review raised by habeas corpus petition concluded that had the jury been properly instructed it would have found that murder was especially heinous, atrocious, or cruel and would have imposed the death penalty; thus, the constitutional error that resulted from the jury weighing an unconstitutionally vague heinousness instruction did not have a substantial and injurious influence in determining the jury's verdict. Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, — U.S. —, 115 S. Ct. 678, 130 L. Ed. 2d 678 (1995).

Rule in State v. Vandiver Not to Apply Retroactively. — The rule in State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1980), which holds that perjury may not constitute a nonstatutory aggravating factor in a sentencing decision is not to apply retroactively. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

Redundant Aggravating Factors, etc. —

In trial for first-degree murder and common-law robbery, where all the evidence suggested that defendant committed the robbery for pecuniary gain, i.e., to resell a ring and radio for cash, submission of both subdivisions (e)(5) and (e)(6) of this section in aggravation was duplicative and constituted error. Moreover, in view of the fact that jury deliberations regarding sentencing lasted two full days, indicating that the jury did not reach a unanimous recommendation of a sentence of death easily, the sentence of death would be set aside and the case remanded for a new capital sentencing hearing. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

An assault on a woman with intent to commit rape is an act exhibiting violence with the intent to commit a subsequent act of violence; as such it is, as a matter of law, an offense involving the use or threat of violence to the person. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence held sufficient to support finding of murder for pecuniary gain. See State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where the evidence showed that defendant broke and entered decedent's home with the intent to steal, and there was no evidence that the burglary was motivated by some impulse other than pecuniary gain, the evidence was sufficient to support a finding of the pecuniary gain aggravating circumstance. State v. Chandler, 342 N.C. 742, 467 S.E.2d 636 (1996).

Evidence Supported Multiple Aggravating Circumstances. — The record supported the jury's finding of aggravating circumstances that the capital felony (murder) was committed during the commission of a felony (burglary) (subdivision (e)(5)), was especially heinous, atrocious, or cruel (subdivision (e)(9)), and was part of a course of conduct which included other crimes of violence committed by the defendant against additional victim (subdivision (e)(11)). Nothing in the record suggested that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

After a thorough review of the transcript, record on appeal briefs, and oral arguments of counsel, the Supreme Court concluded that the evidence supported the jury's finding that each of the aggravating circumstances in subdivisions (e)(9), (e)(10), and (e)(11) existed; that nothing in the record suggested that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor. State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (1995).

Off-Duty Law Enforcement Officers. — Subdivision (e)(8) appropriately includes duly sworn law enforcement officers in uniform performing off-duty, secondary law enforcement related duties, when it is clear that such duties and the pay therefrom are incidental and supplemental to their primary duties of law enforcement on behalf of the general public. State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992), cert. denied, 507 U.S. 1038, 113 S. Ct. 1866, 123 L. Ed. 2d 486 (1993).

Murder of Law Enforcement Officer. — The murder of a law enforcement officer engaged in the performance of his official duties differs in kind and not merely in degree from other murders. When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer engaged in the performance of his duties in the truest sense strikes a blow at the entire public, the body politic, and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The aggravating circumstance, found in subdivision (e)(8) of this section, reflects the General Assembly's recognition of the common concern that the collective conscience requires the most severe penalty for those who flout our system of law enforcement. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Same — Prosecutor's Argument. — It was not improper for the district attorney to argue that the jury should consider the bravery of the law enforcement officers who captured the defendant before he could go into the jurors' homes or rob or hurt someone, that the widow of the deceased highway patrolman had done her painful duty by coming to court each day to see that justice was done, that the law enforcement officers across the State expected the jury to do its duty, and that unless the jury did its duty by recommending death, the jurors would be telling law enforcement officers that their lives and services were without value. Since one of the aggravating circumstances to be considered in determining whether to impose the death penalty is that the person killed was a law enforcement officer in the performance of his official duty, this argument was proper to focus the jurors' attention on this aggravating factor. It was not an appeal to the jury to impose the death penalty because that was what was desired by the public, an argument which is improper. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

B. Prior Convictions.

Defendant's conviction under military law of attempted rape was a conviction for a prior felony involving at minimum the "threat of violence." State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, — U.S. —, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Subdivision (e)(3) of this section includes felonies which were committed through the use or threat of violence to the person, regardless of whether violence was an element of the offense. McDougall v. Rice, 685 F. Supp. 532 (W.D.N.C. 1988).

Under subdivision (e)(3), a prior felony can be either one which has as an element the use or threat of violence to the person, such as rape or armed robbery, or a felony which does not have the use or threat of violence to the person as an element, but as to which the use or threat of violence to the person was actually involved. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, — U.S. —, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Subdivision (e)(3) Refers to Acts Prior to Present Charge. — It will be determined that defendant "had been previously convicted of a felony involving the use or threat of violence to the person" when the prior violent felony occurred before the date the capital defendant committed murder and the capital defendant is convicted of the violent felony at some point prior to the capital trial; the emphasis is on the date of the prior violent felony, not on the date of conviction. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996).

Must Show Prior Convictions Were Felonies. — Where it was not at all clear which, if any, of the prior convictions offered to impeach defendant in his trial for first-degree murder were felonies, the convictions were not admissible for the purpose of establishing the aggravating circumstance set out in subdivision (e)(3) of this section. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

It is the duty of the trial court to determine whether a rational jury could conclude that a defendant had no significant history of prior criminal activity. Then, once the trial court makes such a determination, the mitigating circumstance must then be submitted to the jury, which must decide for itself whether the evidence is sufficient to constitute a significant history of criminal activity, thereby precluding a finding of that circumstance. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Acts Sufficient to Show Use or Threat of Violence. — The acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting involve the "use or threat of violence to the person" within the meaning of subdivision (e)(3). State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994).

It is not necessary to show that the use or threat of violence is an element of a prior felony in order for a prior felony to be used in support of the aggravating circumstance described in subdivision (e)(3) of this section, as in order to substantiate this aggravating circumstance, it is enough to cite a prior felony in which the commission of the felony simply involved use or threat of violence. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Instruction Under Subdivision (e)(3) Held Proper. — Court's instruction, that voluntary manslaughter is crime involving use of violence to the person, did not amount to plain error where defendant did not offer evidence that killing of his former wife did not involve use of violence of the person and where voluntary manslaughter usually — probably always — involves violence to person within meaning and intent of subdivision (e)(3) of this section. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Proof of Prior Felony Under Subdivision (e)(3). —

Where defendant testified he had been convicted of common law robbery within the last ten years, and the State offered criminal records illustrating the conviction, and the robbery victim there testified that defendant used violence in the commission of the robbery, there was substantial evidence that defendant had been convicted of a felony which involved the use or threat of violence to the person and that the felony occurred prior to the murders at issue. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, — U.S. —, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Methods of Proof. —

Evidence of a defendant's prior conviction for attempted second-degree rape consisting solely of the judgment against the defendant for that offense satisfies the state's burden of proving the aggravating circumstance that a defendant had been previously convicted of a felony involving the use or threat of violence to the person. State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994).

The State is entitled to present witnesses in the penalty phase of the trial to prove the circumstances of prior convictions and is not limited to the introduction of evidence of the record of conviction. We hold that the testimony of the circumstances of a prior killing was admissible in the penalty phase of a murder defendant's trial. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Notice of Prior Crimes. — The provisions of subdivision (e)(3) of this section, and defendant's own personal knowledge of his criminal history provide defendant with adequate notice of what crimes might be presented as aggravating circumstances. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Previous Conviction of a Felony in Another State. — Because there was no death penalty in Virginia at the time the defendant pled guilty to first-degree murder in that state, that crime was not punishable by death and was not a capital felony as defined in subdivision (a)(1); therefore, the state's evidence did not support the finding of the aggravating circumstance that the defendant had previously been convicted of another capital felony, and a new capital sentencing proceeding was required. State v. Bunning, 338 N.C. 483, 450 S.E.2d 462 (1994).

A no contest plea may not be used to aggravate a crime so as to sustain a death sentence under subsection (e) of this section. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Testimony of Alleged Prior Rape Held Admissible. — Testimony of an alleged prior rape victim that defendant raped her and threatened to rape and kill her daughter three months prior to the present rape charge was offered in response to defendant's request that the court consider the mitigating circumstance that defendant had no significant history of prior criminal activity and was, therefore, properly admissible. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Guilty Plea to Second Degree Murder. — Where the record established that defendant had pled guilty to second degree murder and had been sentenced to imprisonment of not less than 22 nor more than 28 years, defendant's prior offense thus involved the unlawful killing of another human being with malice, and was therefore among the most serious of the many felonies involving the use or threat of violence to the person. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494

U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Prior Manslaughter Conviction. — The probative value of defendant's prior conviction for involuntary manslaughter was not outweighed by its prejudicial effect in a capital murder case and was, therefore, clearly admissible as an aggravating factor in the sentencing phase of defendant's trial where defendant admitted the conviction and stipulated to it. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where defendant admitted his prior conviction for involuntary manslaughter and stipulated to it, the evidence of the conviction is clearly admissible in the sentencing phase of defendant's trial as an appropriate method of establishing a subdivision (e)(3) aggravating factor. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Defendant was not prejudiced by the admission of evidence of dynamiting convictions, where the court instructed the jury not to consider it and where there was uncontradicted evidence that the defendant had committed armed robbery to support the finding of an aggravating circumstance. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Failure to Submit Limiting Instruction Not Plain Error. — In a murder prosecution, where testimony and photographic exhibits of a prior murder were properly admitted into evidence during the sentencing phase, and it was appropriate for the jury to consider the evidence of the prior murder in finding the course of conduct aggravating circumstance, the trial court's failure to submit a limiting instruction to the jury did not rise to the level of plain error entitling defendant relief. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, — U.S. —, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Circumstances Supported by Different Evidence. — The trial court's submission of (e)(4) and (e)(5) was not error as the evidence underlying these circumstances was not the same: the (e)(4) circumstance was based on the evidence that the murder itself was affected for the purpose of avoiding lawful arrest; the (e)(5) circumstance was based on the evidence that the murder occurred during the commission of a kidnapping. Because these circumstances were supported by different evidence, they cannot be considered redundant. State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994).

Evidence Admissible to Prove Circumstances of Prior Felony. — The State properly could introduce search warrant and supporting affidavit into evidence during the sentencing proceeding to prove the circumstances of a prior felony conviction. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, — U.S. —, 115 S. Ct. 2566, 132 L. Ed. 2d 818 (1995).

The court properly allowed the jury to consider defendant's conviction for assault with a deadly weapon inflicting serious injury which came after the events of this case for a violent felony which was committed prior to the events of this case of capital murder. State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (1996).

C. Avoiding Arrest or Escaping Custody.

Scope of Factor. — The language in § 15A-1340.4(a)(1)b, like that in subdivision (e)(4) of this section, is intended to include situations where defendant's motivation in committing the second offense was to avoid subsequent detection and apprehension for the underlying crime; it is not to be limited solely to situations where defendant committed the second offense in an effort to avoid an immediate arrest or to escape from custody. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

When Submission of Factor, etc. — The "lawful arrest" referred to in subdivision (e)(4) need not be the defendant's own arrest. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence held sufficient, etc. —

In accord with first paragraph in the main volume. See State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where the State's witness testified that he and defendant schemed to kill the victim to prevent her from exposing their involvement in her husband's death, and the evidence presented made it clear that they then killed the victim's daughter to prevent her from identifying them as the men who had murdered her mother, that aggravating factor was properly submitted to the jury. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Use of Motive Not Element of Crime. — The motive of defendant, who was convicted of first degree murder based not on the felony murder rule but on the theory that he aided and abetted a premeditated and deliberated killing, was to avoid arrest, and since avoiding arrest is not an element of aiding and abetting a killing, the merger rule did not preclude its use as an aggravating circumstance. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

D. Felony Murder.

Type of Felony. — Nothing in the wording of this section hints at a legislative intent that, to be used as an aggravating circumstance, the prior felony conviction must have involved an intentional use of or a threat of violence to another person. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994), cert. denied, — U.S. —, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

Factor May Not Be Submitted If Convicted Under Felony-Murder Rule. —

When a defendant is convicted of first-degree murder solely under the theory of felony murder, submission of the underlying felony as an aggravating circumstance is error; proof of the underlying felony is an essential element of the State's proof of felony murder thus, the underlying felony cannot provide a basis for additional punishment. State v. Gregory, 341 N.C. 365, 459 S.E.2d 638 (1995).

Effect of Finding Under Both Felony-Murder, etc. —

When a defendant is convicted of first degree murder based on both premeditation and deliberation, and felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted as aggravating circumstance. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Where the jury convicts a defendant of first-degree murder based solely on the felony murder rule, it is error for the court to submit the underlying felony as one of the aggravating circumstances defined by subdivision (e)(5); however, when a defendant is convicted of first-degree murder based on both premeditation and deliberation and the felony murder rule, and both theories are supported by the evidence, the underlying felony may be submitted as an aggravating circumstance. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, — U.S. —, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

When a defendant is convicted under the theory of premeditation and deliberation and under the felony murder theory enumerated in subdivision (e)(5) and both are supported by the evidence, submission of the underlying felony as an aggravating circumstance is proper. State v. Gregory, 341 N.C. 365, 459 S.E.2d 638 (1995).

Defendant Convicted Under the Theory of Premeditation and Deliberation. — When a murder is committed during one of the felonies enumerated in subdivision (e)(5) and a defendant is convicted solely under the theory of premeditation and deliberation, the other felony may properly be admitted as an aggravating circumstance. State v. Gregory, 341 N.C. 365, 459 S.E.2d 638 (1995).

Murder for Pecuniary Gain. — Considering the totality of the evidence, there were ample facts to support the conclusion that defendant's motive for the murder was pecuniary gain and the trial court did not err in submitting pecuniary gain as a possible aggravating circumstance. State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), cert. denied, — U.S. —, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

Murder While Committing Rape. — Because the jury had to hear evidence concerning the offense in order to consider the aggravating circumstance of whether the capital felony was committed while the defendant was engaged in the commission of a rape, the prosecutor's questions which did not refer specifically to the circumstance were relevant to sentencing. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, — U.S. —, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

Defendant Found Guilty of First-Degree Burglary. — The prosecutor did not misstate the law and impermissibly lessen the state's burden of proof by telling the jurors that since they had found defendant guilty of first-degree burglary, they also found the existence of the aggravating circumstance in subdivision (e)(5) of this section. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114-S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Defendant's actions in killing a man to facilitate the rape of a woman were sufficiently aggravated to support the death sentence; the evidence indicated the fatal shot was fired with cold-blooded calculation and even the defendant's own witness was afraid defendant might shoot him, and although there were numerous mitigating circumstances, only three were statutory and much of defendant's mitigating evidence related to his conduct after he was in jail and to his relationship with family and close friends. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Evidence Held Sufficient. — Evidence was sufficient to support finding of aggravating circumstance of commission of murder while defendant was engaged in armed robbery; witness testified that defendant went to his father's house carrying a shotgun, he returned with a good-sized wad of money belonging to his father, which he later counted as fourteen hundred dollars, and defendant returned from his father's house covered with blood and told witness he had beaten his father to death using the shotgun. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

E. Especially Heinous, Atrocious, or Cruel Act.

And Not Unconstitutionally Vague, etc. —

In accord with first paragraph in main volume. See Smith v. Dixon, 14 F.3d 956 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 129, 130 L. Ed. 2d 72 (1994), rehearing denied, — U.S. —, 115 S. Ct. 678, 130 L. Ed. 2d 678 (1995).

Instruction that "heinous" means "extremely wicked or shockingly evil" is unconstitutionally vague. Thus, in a capital case in which such an instruction was given, death sentence could not stand unless, upon further review, the North Carolina Supreme Court determined that the sentence could be affirmed by applying a constitutional limiting construction to the "especially heinous, atrocious or cruel" circumstance, by reweighing the aggravating and mitigating circumstances without this factor, or pursuant to a harmless error analysis. Smith v. Dixon, 766 F. Supp. 1370 (E.D.N.C. 1991), aff'd, 996 F.2d 667 (4th Cir. 1993).

Propriety of Submitting Factor Depends on Surrounding Facts. —

Aggravating circumstance that murder was "especially heinous, atrocious or cruel" may be found when the killing demonstrates an unusual depravity of mind on the part of the defendant, beyond that normally present in first-degree murder. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

A finding that this aggravating circumstance exists is only permissible when the level of brutality involved exceeds that normally found in first degree murder or when the first degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Vagueness Not Cured. — District court's grant of habeas relief was affirmed because the North Carolina Supreme Court on direct appeal did not cure the unconstitutionally vague sentencing instruction in a capital murder case on the aggravating factor relating to an "especially heinous, atrocious or cruel" murder. Smith v. Dixon, 996 F.2d 667 (4th Cir. 1993).

Subdivision (e)(9) Not Applicable to Every Homicide. — Although every murder may be characterized as heinous, atrocious, or cruel, the General Assembly has made it clear that this aggravating circumstance may be found only in cases in which the first-degree murder committed was either especially heinous, especially atrocious, or especially cruel. For example, a finding that this statutory aggravating circumstance exists is permissible only when the level of brutality involved exceeds that normally found in first-degree murder or when the first-degree murder in question was conscienceless, pitiless or unnecessarily torturous to the victim. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

Victim Choked to Death. — A jury could reasonably infer that as the breath of life was choked out of the victim, she experienced extreme anguish and psychological terror. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, — U.S. —, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), — N.C. —, 472 S.E.2d 23 (1996).

Considerations for submitting the heinous, atrocious, or cruel aggravating circumstance to the jury include (1) those that are physically agonizing or otherwise dehumanizing to the victim, and (2) those that are less violent but involve the infliction of psychological torture. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, — U.S. —, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

Excessive Level of Brutality. — There are two of the types of murders which are conscienceless, pitiless, or unnecessarily, tortuous to the victim or which demonstrate an unusual depravity of mind on the part of the defendant: (1) those that are physically agonizing or otherwise dehumanizing to the victim, and (2) those that are less violent but involve the infliction of psychological torture. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Conscienceless, Pitiless Act. — The evidence was sufficient to support submitting the aggravating circumstances in subdivision (e)(9) to the jury. Evidence that defendant shot victim because her crying made him nervous was evidence that in killing her, he acted in a conscienceless, pitiless manner. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

A jury may infer that manual strangulation involves the infliction of psychological torture as, manual strangulation, by its very nature, may require a continued murderous effort on the part of the assailant for a period of up to four to five minutes, during which time the victim is rendered helpless, aware of impending death, but utterly incapable of preventing it. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Humiliating and Debasing Action. — When a murder takes place during the perpetration of a violent sexual assault upon the victim, it is unusually humiliating and debasing. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Inappropriate Commentary by Prosecutor. — Where prosecutor declared that it was "pathetic" that consideration of the "especially heinous, atrocious or cruel" statutory aggravating circumstance requires the jury "to decide that some murders — can you believe this? — are worse than others," the prosecutor's unobjected-to commentary, while inappropriate, was not so grossly improper as to require the trial court to intervene ex mero motu; any resulting effect of such comments was de minimis in light of the fact that the jury was told at all times it must follow the law and that the law required that the first-degree murders be especially heinous, atrocious or cruel for this circumstance to exist. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Age as a Factor to Be Weighed. — Jury could properly consider the age of victim in determining the weight of the aggravating circumstance that the act was especially heinous, atrocious or cruel. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Closing Argument of Prosecutor Property Allowed. — Trial court properly allowed segment of the closing argument in which the prosecutor stated that the evidence supported inferences that: (1) the victim was alive as defendant bludgeoned her, (2) the victim was alive when defendant inserted tree limb in her rectum, and (3) defendant twisted the stick in the rectum as he inserted it; the argument sought to give the jury a complete picture of the merciless nature of the crime. It did not encourage the jury to find the murder especially heinous, atrocious, or cruel simply on the basis of the sex offense but rather on the basis of the overwhelming brutality of the crime. State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995).

Evidence Held Sufficient. — The aggravating factor that a murder was especially heinous, atrocious or cruel, was not improperly submitted to the jury, where evidence was elicited which tended to show that defendant beat victim with an iron pipe, stuffed her mouth with a rag to stop her screaming, straddled her body, grabbed her by the throat and dragged into the bathroom where he forced her head under the water in a half-filled tub and held it there while she struggled desperately for her life. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Trial court did not err in submitting as an aggravating circumstance that murder was especially heinous, atrocious or cruel where witness testified that defendant grabbed victim around her neck, pulled out a knife and forced her into a bedroom, demanded her food stamps, choked her until she lost consciousness, then told witness to get his rifle from next door, and when she did, he shot the victim. State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989), vacated and remanded for further consideration at 494 U.S. 1050, 110 S. Ct. 1516, 108 L. Ed. 2d 756 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence supported a finding that the level of brutality exceeded that normally found in first-degree murder cases and that it was pitiless and unnecessarily torturous to the victim and was an especially "heinous, atrocious, or cruel" murder, where the evidence, taken in the light most favorable to the State, tended to show an extremely brutal attack consisting of 27 separate gunshot entrance wounds. Two gunshot wounds to the left forehead had been inflicted from extremely close range, and wounds to the face and chest occurred before the victim died. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

Submission of an aggravating circumstance was proper where the victim, a 78-year-old man who had undergone heart surgery and suffered a ruptured appendix, while practically helpless, temporarily fended off defendant's attack, but ultimately suffered stab wounds in the chest area, abrasions on the face, bruises and lacerations around the mouth, and bruises and incisions on the forearm, and where there was testimony that the victim could have lived up to 10 minutes after sustaining the stab wounds. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Evidence was sufficient to support a finding that a first-degree murder was especially heinous, atrocious or cruel, where both victims were unable to defend themselves due to extreme intoxication when the defendant began beating them severely with his fists, where they remained helpless as he took a claw hammer from the car and proceeded to beat each helpless victim mercilessly about the head and torso with the hammer, causing numerous lacerations, bruises, skull fractures and areas of hemorrhaging and where the victims were found in pools of blood, with pieces of flesh, skull and brain matter scattered about their bodies. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct.

1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Where the jury found the capital felony was committed while the defendant was engaged in the commission of the crime of first degree burglary and the capital felony was especially heinous, atrocious and cruel, the evidence presented at trial showed that defendant broke down the door and entered the victim's home around 3:00 a.m. and brutally stabbed her in front of her daughter and her mother who tried to stop him and defendant then proceeded to drag her out of the front door and into the driveway while continuously stabbing, hitting, and kicking her, the evidence clearly supported the jury's finding of each of these aggravating circumstances. State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994), cert. denied, — U.S. —, 115 S. Ct. 768, 130 L. Ed. 2d 665 (1995).

Where the jury found a single aggravating circumstance but found no mitigating circumstance, specifically rejected the impaired capacity circumstance, and where the murder was particularly brutal and the defendant showed no remorse, the death sentence was not excessive or disproportionate, considering both the crime and the defendant. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, — U.S. —, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

When a murderer attacked an elderly victim by surprise and beat his brains out of his head by repeated blows of an axe handle without the slightest sign of provocation, it may be said that there is an inference that the murder was conscienceless and pitiless. Evidence that defendant committed a similar set of murders just six weeks later, after a boastful discussion of his murderous capabilities, was further evidence of a lack of pity for defendant's victims. Thus, the facts suggest a depravity of mind on the part of the killer not easily matched by even the most egregious of slayings, as well as a level of brutality that exceeds that ordinarily present in the first degree murders. State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994), cert. denied, — U.S. —, 115 S. Ct. 1366, 131 L. Ed. 2d 222 (1995).

Where defendant was convicted of three first-degree murders and the record established a cold-blooded, calculated course of conduct on the part of defendant which amounted to a wanton disregard for the value of human life, the two death sentences were not excessive or disproportionate, considering both the crimes and defendant. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, — U.S. —, 115 S. Ct. 2566, 132 L. Ed. 2d 818 (1995).

Death sentence held appropriate where the murder victim was a defenseless four-month-old baby who was left in the care of defendant at the time of the murder and the injuries inflicted upon the child were numerous, going beyond what would be necessary to kill the victim, and brutal. The child suffered bruises all over her body, including bruises on her neck, bruises on her arms, ears, torso, and legs, and both of the child's arms and legs were broken. State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995).

Sentence of death was not disproportionate where defendant wrapped two belts around 92-year-old Reverend's neck, beat the Reverend in the face with a glass bottle and, with a double-edged razor blade, sliced the Reverend's arms, 17 inches on one arm and 14 inches on the other. State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995).

Instruction Under Subdivision (e)(9), etc. —

Where jury instruction in a capital murder case stated in part: "This murder must have been a consciencelessness [sic] or pitiless crime which was unnecessarily torturous to the victim," the jury received adequate guidance concerning the meaning of the "especially heinous, atrocious, or cruel" aggravating circumstance; therefore, the verdict was not subjective and arbitrary. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

F. Risk of Death to More Than One Person.

Use of a Shotgun. — A shotgun in its normal use may be considered a weapon hazardous to the lives of more than one person as those words are used in subdivision (e)(10) of this section. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Use of Weapon Normally Hazardous to More Than One Person. — Evidence was sufficient to support the jury's finding that the defendant knowingly created a great risk of death to more than one person by use of a weapon which would normally be hazardous to the lives of more than one person. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, — U.S. —, 115 S. Ct. 2634, 132 L. Ed. 2d 873, rehearing denied, — U.S. —, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

G. Course of Conduct.

Some Connection Required. — The further apart the acts are temporally, the more incumbent it is upon a court to carefully consider other factors, such as modus operandi and motivation, in determining whether the acts of violence are part of a course of conduct; thus, in order to find course of conduct, a court must consider the circumstances surrounding the acts of violence and discern some connection, common scheme, or some pattern or psychological thread that ties them together. State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992).

The State's evidence tended to show that four days before the double murder at motel, defendant robbed convenience store and killed the clerk and that less than three weeks after the motel shootings, defendant shot a taxicab driver, there was a span of only twenty-two days from the murder of the clerk and robbery at the convenience store to the shooting of the taxicab driver; the time frame was sufficiently close to support the submission of this aggravating circumstance. Further, the modus operandi was similar in that evidence tended to show that defendant used the same pistol to kill, or attempt to kill each victim and had one or two accomplices during each crime and, finally, the evidence of motivation was strong; numerous witnesses testified that these acts were robberies for the purpose of obtaining money to buy drugs. State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (1995).

Transactionally Connected Offenses Joined for Trial. — Where several similarities tied murders together and suggested a common motivation or modus operandi supporting the finding of a transactional connection for purposes of joinder, they also supported the submission and finding of the course of conduct aggravating circumstance. State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, — U.S. —, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

Where the crimes occurred within moments of each other at the same location and the same modus operandi was used in each killing, the facts clearly established that the two crimes were committed as a part of a course of conduct in which defendant engaged and which included the commission by defendant of a crime of violence against another person. State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994), cert. denied, — U.S. —, 115 S. Ct. 953, 130 L. Ed. 2d 895, cert. dismissed, — N.C. —, 465 S.E.2d 547 (1995).

Evidence Held Sufficient. — Evidence was sufficient to warrant the submission of the course of conduct aggravating circumstance to the jury where defendant undertook a violent course of conduct, over a period of two days, in which he physically battered his girlfriend, threatened to kill her and ultimately tried to drown her — the very day he succeeded in drowning her son. State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995).

IV. MITIGATING CIRCUMSTANCES.

A. In General.

Editor's Note. — *The case notes under the heading "**Burden Constitutional**" in the main volume should be disregarded with respect to statutory mitigating circumstances, in light of State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).*

*The annotation to the case of State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316 (1988), cited in the main volume under the black letter line "**Requiring jurors to reach unanimous decisions regarding the presence of mitigating circumstances**," and the case of State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), cited in the main volume under the black letter line "**When any mitigating circumstance is unanimously found to exist**," should be disregarded in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).*

For case holding unanimity requirement for finding of mitigating factors *unconstitutional, see McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), annotated under analysis lines I and II, above.*

Consideration of Mitigating Circumstances on Voir Dire. — A defendant may not use voir dire to stake out potential jurors by asking whether they could consider specific mitigating circumstances during the sentencing phase. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Due process is not violated by requiring the defendant to prove mitigating circumstances by the preponderance of the evidence. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

"McKoy" Error — Held Harmless. — Trial court's error in requiring the jury to answer each mitigating circumstance "no" if it did not find the circumstance unanimously by a preponderance of the evidence was harmless beyond a reasonable doubt because there was unequivocal extrinsic evidence, both from the jury foreman's colloquy with the court and the individual jurors' answers, that the instruction did not prevent any juror's consideration of the defendant's mitigating evidence; rather, the jury was unanimous in rejecting the one mitigating circumstance that it failed to find. State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 216, 116 L. Ed. 2d 174 (1991), rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Since the jury found all submitted mitigating circumstances, any error in trial court's instructions requiring the jury to unanimously find a mitigating circumstance before it could be meaningfully considered in defendant's favor was harmless beyond a reasonable doubt. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Absent extraordinary facts, the erroneous submission of a mitigating circumstance is harmless. State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (1996).

Same — Harm Found. — Where there was evidence to support the submitted but unfound mitigating circumstances, the error under McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) was not harmless. State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990), cert. denied, 489 U.S. 1051, 111 S. Ct. 763, 112 L. Ed. 2d 782 (1991).

Where, in a murder prosecution the jury failed to find unanimously several proposed mitigating circumstances supported by substantial evidence, and where some, but not all jurors may have found credible the evidence in support of some or all of these circumstances and that the nonstatutory circumstances had mitigating value, had each juror been allowed to consider such of these circumstances as each found to exist, and the evidence supporting them, in the final weighing process, it cannot be said beyond a reasonable doubt that there would not have been a different result in the sentence. State v. McKoy, 327 N.C. 31, 394 S.E.2d 426 (1990).

The North Carolina Supreme Court could not conclude beyond a reasonable doubt that the erroneous unanimity jury instruction did not preclude one or more jurors from considering in mitigation defendant's evidence of his diminished capacity to appreciate the criminality of his act or to conform his conduct to the requirements of the law. Nor could it conclude beyond a reasonable doubt that had such jurors been permitted, under proper instructions, to consider the circumstance, they would nevertheless have voted for the death penalty rather than life imprisonment. State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Where the trial court instructed the jury to answer each mitigating circumstance "no" if the jury did not unanimously find the circumstance by a preponderance of the evidence, the instruction constituted error as a juror could have found the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because he was under the influence of drugs where defendant consumed two beers and smoked five marijuana cigarettes six-and-one-half hours before the murder. State v. Quesinberry, 328 N.C. 288, 401 S.E.2d 632 (1991).

Instruction that the jury had to unanimously find each mitigating circumstance before considering that circumstance in the ultimate sentencing decision constituted error requiring a new sentencing proceeding where there was evidence tending to support the statutory circumstance of impaired capacity. State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991).

Where there was substantial evidence to support each of the submitted mitigating circumstances, one of which was by statute deemed to have mitigating value and the others of which were such as a juror could reasonably find to have mitigating value, instructions contrary to the dictates of McKoy necessitated a new sentencing hearing. State v. Artis, 329 N.C. 679, 406 S.E.2d 827 (1991).

Where there was substantial evidence from which a juror reasonably might have found the "catchall" statutory mitigating circumstance that was submitted, McKoy error in the instructions would necessitate a new capital sentencing proceeding. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

McKoy error as to issue of whether murder was committed while the defendant was under the influence of a mental or emotional disturbance was not harmless, and because of it, defendant was entitled to be given a new capital sentencing hearing. State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991).

Where evidence presented at trial and during sentencing proceeding supported reasonable inferences that defendant's participation in both murders was relatively minor, that he acted under the domination of another person, and that his low I.Q. impaired his ability to make judgments, court could not conclude beyond a reasonable doubt that erroneous unanimity instruction did not preclude one or more jurors from considering in mitigation defendant's lesser and subordinate role in the two murders or his impaired mental abilities. State v. Barnes, 330 N.C. 104, 408 S.E.2d 843 (1991).

Where the jury was required to be unanimous in finding mitigating circumstances and uncontradicted evidence could have supported determination that defendant's ability to conform his conduct to the requirements of the law was impaired, or that defendant acted under influence of mental or emotional disturbance, yet jury answered "no" as to statutory mitigating circumstances addressing defendant's mental condition, the McCoy error was not harmless. State v. Simpson, 331 N.C. 267, 415 S.E.2d 351 (1992).

All the Evidence Must Be Taken into Account by the Trial Court. — Whereas subsection (b) of this section mandates that a mitigating circumstance be submitted to the jury for its consideration when it may be supported by the evidence, all the evidence must be taken into account by the trial court — not just that which the court has ruled admissible for other purposes. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Weight of Mitigating Circumstances for Jurors to Determine. — Where, after being instructed by the court to consider impaired capacity as a mitigating circumstance if defendant proved that circumstance by a preponderance of the evidence, juror answered, "I would weigh it, your honor, but it would carry little weight, I'm afraid. I don't consider that a mitigating circumstance, but I would weigh it," trial court did not err in denying the challenge to this potential juror as defendant is entitled to have the jury consider all appropriate mitigating circumstances, but the weight to be given each circumstance is for the individual juror to determine. State v. Smith, 328 N.C. 99, 400 S.E.2d 712 (1991).

Jury Must Be Permitted to Consider Mitigating Circumstances. —

Instruction that told jurors they could give no weight to statutory mitigating circumstances they found to exist was contrary to the intent of subsection (f) and was an incorrect statement of the law. State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (1996).

The trial court must offer for the jury's consideration any mitigating circumstance that the jury might reasonably find supported by the evidence, and when the evidence adduced at trial appears to support the mitigating circumstance that defendant had no prior significant history of criminal activity, both parties must be given the opportunity to introduce additional evidence supporting or rebutting that circumstance. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Substantial Evidence of Mitigating Factors. — The trial court is not required to instruct upon a statutory mitigating circumstance unless substantial evidence has been presented to the jury which would support a reasonable finding by the jury of the existence of the circumstance. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, — U.S. —, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

In order to show reversible error in the trial court's omission of a statutory mitigating circumstance in a capital case, defendant must affirmatively establish three things: (1) That the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in subsection (f) of this section); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

Burden on Issue of Mitigating, etc. —

Whether a violation of a defendant's federal constitutional rights is prejudicial is controlled by subsection (b) of this section, and such violation is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the state to so prove. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Burden Constitutional. — The North Carolina Supreme Court abandoned the Pinch test with respect to statutory mitigating circumstances because due process constitutional issues are involved and, as to constitutional issues, the Pinch test impermissibly shifts the burden of proof to the defendant. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988). See also, State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Right to Peremptory Instruction. —

The trial court is required to give a peremptory instruction, if the defendant so requests, when evidence showing that the mitigating circumstance exists is uncontroverted. State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995).

Nonstatutory mitigating circumstances do not have mitigating value as a matter of law. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

No Duty to Instruct on Nonstatutory Factors, etc. —

Where neither defendant nor the state introduced evidence to show that defendant had no significant history of prior criminal activity, the court did not err in refusing to instruct the jury on this mitigating circumstance. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Nonstatutory Mitigating Factors. — Nonstatutory mitigating circumstances do not necessarily have mitigating value and it is for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value for although evidence may support the existence of the nonstatutory circumstance, the jury may decide that the circumstance is not mitigating. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

When a jury determines that a statutory mitigating circumstance exists, it is not free to refuse to consider the circumstance and must give it some weight in its final sentencing determinations; however, it is for the jury to determine whether submitted nonstatutory mitigating circumstances established by the evidence should be given any mitigating value and nonstatutory mitigating circumstances are mitigating only when one or more jurors deem them to be so. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994), cert. denied, — U.S. —, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

Failure to Submit Nonstatutory Mitigating Circumstances to Jury Raises Federal Constitutional Issues. — Upon such showing by a defendant, (1) that a nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) that there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury, the failure by the trial judge to submit such nonstatutory mitigating circumstance to the jury for its determination raises federal constitutional issues. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

No Requirement to Specify Those Factors, etc. —

Although it is the better practice for a jury to specify on the verdict form which mitigating circumstances it finds and which it does not find, there is no constitutional or statutory requirement that it do so. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

In determining whether a mitigating, etc. —

In accord with the main volume. See State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Evidence Unrelated to Defendant Properly Excluded. —

Evidence that wife suffered from the battered woman syndrome did not entitle her to a charge on self-defense, following State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989). State v. Grant, 343 N.C. 289, 470 S.E.2d 1 (1996).

Evidence Defendant Showed Remorse. — The jury cannot be precluded from considering mitigating evidence relating to the defendant's character or record and the circumstances of the offense that the defendant offers as the basis for a sentence less than death. Proffered testimony that the defendant was sorry for what he had done showed his remorse and should have been admitted as relevant mitigating evidence in the sentencing phase of his capital trial. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, — U.S. —, 115 S. Ct. 2634, 132 L. Ed. 2d 873, rehearing denied, — U.S. —, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

A defendant's failure to harm eyewitnesses is not a mitigating circumstance. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Court's Refusal to Submit Mitigating Factors Independently Was Not Error. — Where court refused to submit three mitigating circumstances as separate factors, but instead incorporated their content into its instructions on two other mitigating circumstances, court's refusal to submit proposed circumstances to the jury as independent mitigating circumstances was not error since mechanical, mathematical approach to capital sentencing was rejected and refusal to submit proposed circumstances separately and independently was within dictates of constitutional precedent. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Refusal to Submit Nonstatutory Factors Held Not Error. — Where the court's instructions required the jury to consider defendant's relationship with the victim in determining defendant's sentence, the court did not err in refusing to submit defendant's requested nonstatutory mitigating circumstance of an extenuating relationship between defendant and the victim. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Refusal to Submit That Crime Was Out of Character for Defendant. — In a first-degree murder case, the trial judge properly refused to submit as a mitigating circumstance that the crime was out of character for defendant, where the evidence that might have supported that circumstance did not include defendant's character and behavior between 1980, when he joined the Marines, and 1985, when the offenses occurred. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Refusal to Submit Adjustment to Jail Life. — In a first-degree murder case the trial judge properly refused to submit the mitigating circumstance that defendant had adjusted well to jail life, where the trial judge noted that there was no evidence to support the proposed circumstance and called upon defendant's counsel to point out the evidence supporting it, but defendant's counsel replied that he did not want to be heard. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Refusal to Submit That Defendant Did Not Resist Arrest. — In a first-degree murder case, the refusal of the trial judge to submit as a mitigating circumstance that defendant did not resist arrest was not error, where the trial judge submitted as mitigating circumstances that defendant cooperated with the police upon his arrest, that he voluntarily confessed, and that he voluntarily agreed to searches of his car, motel room, home, and storage bin. The proposed circumstance was subsumed in these mitigating circumstances. State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988).

Mitigating Circumstances Far Outnumbered Aggravating Circumstances. — Trial court did not violate subsection (b) of this section by failing to impose a life sentence in the killing of two victims when the jury returned with its non-unanimous verdict after two hours' deliberation, or after 45 minutes' additional deliberation, when the trial was reconvened on Monday morning; the trial court did not abuse his discretion since two aggravating circumstances and 24 mitigating circumstances were submitted in the killing of one victim and one aggravating circumstance and 24 mitigating circumstances in the killing of the other victim, for a total of three aggravating circumstances and 48 mitigating circumstances, and since at the time the jury returned with its nonunanimous verdict it had deliberated for less than two hours, and at the time the jury reconvened on Monday morning, it had deliberated for less than two hours and 45 minutes. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Nonstatutory Mitigating Circumstance. — Even though the trial judge found that the evidence of mitigating circumstances was uncontroverted, it was not error for the judge to require the jury both to find that the circumstance existed and to find that the circumstance had mitigating value; the jury only "finds" a nonstatutory mitigating circumstance if it finds that the evidence supports the existence of the circumstance and if it deems it to have mitigating value. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Where prosecutor stated that the statutory mitigating circumstances submitted in this case had been passed into law by the Legislature, so that the Legislature had therefore provided for their consideration by the jury, and that the nonstatutory mitigating circumstances were created and urged upon the jury by defense counsel, there was no implication in this statement that the nonstatutory mitigating circumstances submitted to the jury were unworthy of the jury's consideration. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), vacated and remanded for further consideration at 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991).

Finding and Weighing of "Any Other Circumstance". — Prosecutor did not improperly limit the scope of the matters in mitigation which the jury could have found and weighed under the "any other circumstance" provision of subdivision (f)(9) of this section; the prosecutor's statement essentially told the jurors that they could find any circumstance supported by the evidence to be mitigating, and taken in its entirety it would have been reasonably interpreted by jurors only as an admonition to base their finding and weighing of "any other circumstance" in mitigation upon the evidence and not upon their emotions. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Evidence Held Insufficient. — Where there was nothing in the transcript to show that defendant in a murder prosecution was an excessive user of drugs or alcohol which might have brought him under the influence of his codefendant, and the only evidence as to parental obligation was that defendant's daughter lived with his mother and he visited her and brought her presents, the evidence on both mitigating factors was insufficient to require their submission to the jury. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L.

Ed. 2d 601 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

B. No Significant Prior Criminal Activity.

It is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether by such evidence a rational juror could conclude that this mitigating circumstance exists. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Standard for Determining Prejudice Upon Failure to Submit. — Because failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity, when it is supported by the evidence, is a violation of both our statute and the Eighth Amendment, the standard for determining prejudice is § 15A-1443(b), which provides that violation of defendant's federal constitutional rights is prejudicial unless the State can demonstrate on appeal that it was harmless beyond a reasonable doubt. State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994).

Time of Prior Criminal Activity. — The history of prior criminal activity referred to defendant's criminal activity prior to the murder for which he was being sentenced, not prior to sentencing; therefore, the crimes for which defendant was convicted in 1986 were not relevant to the mitigator, "history of prior criminal activity", as used in subdivision (f)(1). State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

Not Submitted Where No Evidence of Prior Record. — Where the record showed defense counsel stated that no evidence of defendant's criminal history was presented by the defense or the state and the defense had chosen not to request submission of mitigating circumstances in subdivision (f)(1) of this section, since the record showed that no evidence was offered to support an instruction on mitigating circumstances in subdivision (f)(1), the trial court did not err in failing to submit it. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Where there is no recorded evidence of a capital defendant's criminal history, the subdivision (f)(1) mitigating circumstance may not be submitted to the jury; where there is evidence supporting this circumstance, it is the trial court's duty to determine whether a rational jury could conclude that defendant had no significant history of prior criminal activity. State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

Prior Criminal History Must Be Significant. — The court must determine whether a rational jury could conclude that the defendant had no "significant" history of prior criminal activity; a defendant's criminal history is considered "significant" if it is likely to affect or have an influence upon the determination by the jury of its recommended sentence. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, — U.S. —, 115 S. Ct. 2634, 132 L. Ed. 2d 873, rehearing denied, — U.S. —, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

New Trial Warranted. — Where the trial court gave a peremptory instruction on the mitigating circumstance of the defendant's lack of criminal history but did not give a peremptory instruction on other nonstatutory mitigating circumstances which were supported by uncontroverted evidence, the trial court erred and defendant was entitled to a new sentencing proceeding for convictions for three first-degree murders. State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

Failure to Submit Held Harmless Error. — Assuming that the trial court's failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity was error, the error was harmless beyond a reasonable doubt; given the lack of any substantial evidence on the matter of prior criminality of the defendant and the trial court's erroneous peremptory instruction — favorable to the defendant — that the jury must find the nonstatutory mitigating circumstance of no prior convictions for violent felonies, the defendant received virtually the same benefit he would have received if the jury had found the statutory mitigating circumstance of no significant history of prior criminal activity. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert.

denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Where during capital sentencing proceeding the trial court erroneously failed to submit the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity, the sentence of death entered against the defendant was vacated and the case remanded to the Superior Court for a new capital sentencing proceeding. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, — U.S. —, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

In a death penalty case, where nonstatutory mitigating circumstances were submitted to the jury in lieu of the statutory mitigating circumstance of "no significant history of prior criminal activity," the state did not prove that the error was harmless beyond a reasonable doubt, since the jury was not required to give any weight to the nonstatutory mitigating circumstances, but, by contrast, would have been required to give value to a statutory mitigating circumstance. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, — U.S. —, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Where evidence of prior history of criminal activities was limited to that tending to show defendant's use of illegal drugs and her theft of money and credit cards to support her drug habit, it did not establish that the defendant had such a significant history of prior criminal activity that no rational jury could find the existence of the statutory mitigating circumstance. Therefore, the trial court erred by failing to submit this mitigating circumstance to the jury. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, — U.S. —, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

No New Hearing If Failure to Submit Was Harmless. — Defendant was not entitled to a new sentencing proceeding because the trial court did not submit the statutory mitigating circumstance that the defendant has no significant history or prior criminal activity; witness's cursory and unsubstantiated references to past marijuana use by the defendant were not, standing alone, substantial evidence as to whether the defendant had a significant history of criminal activity and a jury finding of no significant history of criminal activity, solely upon witness's remarks about marijuana use, would have been based purely upon speculation and conjecture, not upon substantial evidence. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

C. Mental or Emotional Disturbance.

Mental Retardation No Exception. — This statute, which provides for the death penalty, does not have an exception for mental retardation. State v. Best, 342 N.C. 502, 467 S.E.2d 45 (1996).

Provocation Not Prerequisite to Factor. — Although some provocation will almost always be present where defendant suffers from a mental or emotional disturbance contemplated by subdivision (f)(2) of this section, it is not a prerequisite to submission of this mitigating circumstance. State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991), explaining State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Failure of State to Controvert Expert Testimony. — The trial court should have instructed peremptorily on the mitigating circumstance that the defendant suffered a mental or emotional disturbance at the time of the murder where the defendant submitted evidence in support of this statutory mitigating circumstance in the form of expert testimony, and the state presented no evidence that controverted the defendant's evidence on this mitigating circumstance. State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994).

Voluntary intoxication by alcohol or narcotic drugs, etc. —

Defendant's alleged voluntary alcohol use on the night that he committed burglary and murder did not qualify as a mental or emotional disturbance for purposes of subsection (f)(2). State v. Chandler, 342 N.C. 742, 467 S.E.2d 636 (1996).

Drug withdrawal stemming from voluntary intoxication does not qualify as a mental or emotional disturbance for purposes of subdivision (f)(2). State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

No Mitigating Circumstance Where Psychiatrists Examined Defendant Long After Crime. — Defendant did not present uncontradicted and inherently credible evidence to support the existence of the statutory mitigating circumstance that he was under the influence of mental or emotional disturbance, where, even though defendant presented two psychiatrists who testified that he was suffering from significant psychological disorders at the time of the shooting, those experts did not examine the defendant until several weeks or months after the crime and there was other evidence which contradicted the experts. State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988), death sentence vacated and case remanded, McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

Argument of Prosecutor. — Defendant failed to show prejudice in the prosecutor's argument to the jury where he quoted irrelevant law, repeatedly reminded the jury that they were being asked to consider whether mitigating circumstances reduced defendant's culpability, and argued against mitigating circumstances in subdivision (f)(2) of this section by emphasizing evidence that the greater component of defendant's incapacity consisted of his personality disorder, not his low mental capacity. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Submission of Nonstatutory Mitigating Factor Instead. — Where a trial judge did not instruct the jury to consider defendant's mental retardation with respect to the statutory mitigating circumstance, but instead submitted a separate, nonstatutory circumstance, instructing the jury to consider whether defendant bordering on mild mental retardation, with a full scale intelligence quotient of 67, was a mitigating factor, this was not an abuse of discretion. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

E. Impaired Capacity.

When Subdivision (f)(6) Circumstance Exists. —

Impaired mental capacity would exist if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished). State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

No Error Not to Submit Impaired Mental Capacity Due to Drugs or Alcohol. — It was not error not to submit the mitigating circumstance of defendant's impaired mental capacity to the jury where the fact that defendant may have taken a drug several hours before the shooting or that he may have drunk some beer was not sufficient alone to show a diminished capacity to appreciate the criminality of the offense or to refrain from illegal conduct. State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988), vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), rehearing denied, 507 U.S. 1046, 113 S. Ct. 1885, 123 L. Ed. 2d 503 (1993).

Bipolar Disorder. — Where the record revealed no evidence that defendant was under the influence of either bipolar disorder or antisocial personality disorder at the time he committed attempted robbery with a dangerous weapon and first-degree murder, the submission of a peremptory instruction was not required, and the trial court did not err in failing to make such instruction during the sentencing phase of defendant's trial. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996).

Oversimplification of Law Held Not Gross Impropriety. — While some of prosecutor's language may have oversimplified the law concerning the statutory mitigating circumstance of impaired capacity and might have been construed as additional improper commentary on the sentencing law, his argument did not rise to the level of gross impropriety requiring the trial court to intervene ex mero motu, as any potential impact of the statements was de minimis and as the jury found this statutory circumstance in mitigation of the crimes. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S. 1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Presumption of Mitigating Value. — Since the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law is a statutory mitigating circumstance, it is presumed to have mitigating value if found. State v. Cummings, 329 N.C. 249, 404 S.E.2d 849 (1991).

New Sentencing Proceeding Where Jury Instruction Erroneous. — The sentence of death was vacated and a new sentencing proceeding ordered due to error in instructing jury to find unanimously each mitigating circumstance before considering that circumstance in the ultimate sentencing decision; there was evidence tending to support the statutory mitigating circumstance of impaired capacity. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Plain Error Not Found. — Where defendant's evidence concentrated on the combined effects of gasoline inhalation, alcohol consumption and lower intelligence, the trial court's instruction in the conjunctive accorded with defendant's evidence and thus, the instruction on impaired capacity did not constitute plain error. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, — U.S. —, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

F. Age of Defendant.

Age Must Have Mitigating Value. — Unless a defendant's age has mitigating value as a matter of law, a juror need consider the defendant's age only if that juror finds by a preponderance of the evidence that defendant's age has mitigating value. State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, — U.S. —, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995).

Independent Duty of Court to Submit Factor of Age. — Testimony of clinical psychologist that the defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten-year-old was substantial evidence from which a juror or jurors reasonably could find that the defendant's age at the time of the offense was mitigating; therefore, regardless of the defendant's wishes about the matter, the trial court had an independent duty to submit the statutory mitigating circumstances. State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994).

Chronological age is not the determinative factor with regard to the mitigating circumstance of age of the defendant at the time of the crime, the defendant's immaturity, youthfulness, or lack of emotional or intellectual development at the time of the crime must also be considered. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

Failure to Consider Mental Age. — Where the jury did not consider the nonstatutory factor that the mental age of the defendant at the time of the murder was a mitigating circumstance, although defendant had offered credible evidence that defendant was functioning in a mentally retarded range of intellect with an I.Q. that placed him in the lowest two percent of the population, McKoy error in instruction as to unanimity in finding mitigating circumstances necessitated a new sentencing hearing. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Defendant was not entitled to a new sentencing proceeding because the trial court failed to submit to the jury the statutory mitigating circumstance of his age at the time of the crimes; no evidence concerning the defendant's age was before the jury and the defendant's only witness introduced no substantial evidence of his immaturity, youthfulness or lack of emotional or intellectual development at the time of these crimes and on the contrary, witness testified that the defendant had been a trustworthy, responsible and dependable employee who was soon to become an unsupervised construction foreman with a crew of his own. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence aff'd, State v. Laws, 328 N.C. 550, 402 S.E.2d 573, cert. denied, 502 U.S. 876, 112 S. Ct. 127, 116 L. Ed. 2d 174, rehearing denied, 502 U.S.

1001, 112 S. Ct. 627, 116 L. Ed. 2d 648 (1991).

Where the evidence was not sufficient to show that a 20-year-old defendant had not developed normally mentally or emotionally, it was not error for the judge to fail to submit the mitigating circumstance of age of the defendant. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

G. Aid in Apprehension of Another or Testimony on Behalf of Prosecution of Another Felony.

Aiding in Apprehension of Coconspirator. — Where there was sufficient evidence to support the assertion that defendant aided in the apprehension of his coconspirator, and the omission of this factor in the witness's submission to the jury potentially worked to the prejudice of defendant, he was entitled to a new sentencing hearing. State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990).

Evidence Insufficient to Support Submission of Age as Factor. — Where defendant asserted at sentencing phase of his trial for first-degree murder that his borderline I.Q. of 71 and his chronological age of 61, combined, supported submission of the circumstances of his age to the jury as a mitigating circumstance, when balanced against defendant's youthful interest in the victim, his vigorous responses to the prosecutor's cross-examination, and his physical prowess in his attempts to escape, the evidence did not require submission of this circumstance. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

§ 15A-2001. Capital offenses; plea of guilty.

CASE NOTES

Where defendants were being jointly tried for the same capital offense when one defendant changed his plea to guilty, it was error for the trial to continue as both a sentencing proceeding as to one defendant and as a trial to determine the guilt or innocence of the other. State v. Hucks, 323 N.C. 574, 374 S.E.2d 240 (1988).

§ 15A-2002. Capital offenses; jury verdict and sentence.

If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison, without parole.

The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole. (1977, c. 406, s. 2; 1993, c. 538, s. 29; 1994, Ex. Sess., c. 21, s. 5; c. 24, s. 14(b).)

Editor's Note. — Session Laws 1993, c. 538, s. 29, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 21, s. 5, which amended this section, in s. 8 provides: "This act becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after that date. Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal, expiration, or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

CASE NOTES

Legislative Intent. —

The General Assembly has amended this section to require the trial court to instruct the jury during a capital sentencing proceeding concerning the parole eligibility of a defendant sentenced to life; however, the General Assembly has decided that the legislation is to be applied prospectively. State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994), cert. denied, — U.S. —, 115 S. Ct. 953, 130 L. Ed. 2d 895, cert. dismissed, — N.C. —, 465 S.E.2d 547 (1995).

Use of Word "Recommendation" in Instructions. — Where an examination of the voir dire makes it plain that the jury had to be aware that its recommendation to impose the death sentence was binding, and the arguments of both of petitioner's lawyers made it poignantly clear that the ultimate decision was in the jury's hands, the trial court's use of the word "recommendation" while instructing the jury during the capital sentencing phase did not constitute prejudicial error. Smith v. Dixon, 766 F. Supp. 1370 (E.D.N.C. 1991), aff'd, 996 F.2d 667 (4th Cir. 1993).

Instruction Not Required. — Although the General Assembly amended this section to require the trial court to instruct the jury during a capital sentencing proceeding concerning the parole eligibility of a defendant sentenced to life, defendant was not entitled to such an instruction. State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, — U.S. —, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Cited in State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990); State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995); State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996).

Chapter 15B.

Victims Compensation.

Sec.
15B-3. Crime Victims Compensation Commission.

§ 15B-1. Short title.

Legal Periodicals. —
For comment, "Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System," see 72 N.C.L. Rev. 1479 (1994).

§ 15B-2. Definitions.

CASE NOTES

Payments made to the victim pursuant to under-insured or uninsured coverage are from a collateral source as defined in this section, and an award under the Crime Victims Compensation Act, will be reduced to the extent that the economic loss will be recouped from under-insured or uninsured coverage. See Opinion of Attorney General to Gary B. Eichelberger, Director, North Carolina Crime Control and Public Safety, Division of Victim and Justice Services, — N.C.A.G. — (May 8, 1995).

§ 15B-3. Crime Victims Compensation Commission.

(a) There is established the Crime Victims Compensation Commission of the Department of Crime Control and Public Safety, consisting of five members as follows:

(1) One member to be appointed by the Governor;
(2) One member to be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate under G.S. 120-121;
(3) One member to be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121;
(4) The Attorney General or his designee; and
(5) The Secretary of the Department of Crime Control and Public Safety or his designee.

(b) Members shall serve terms of four years. A member shall continue to serve until his successor is duly appointed, but a holdover under this provision does not affect the expiration date of the succeeding term.

(c) In case of a vacancy on the Commission before the expiration of a member's term, a successor shall be appointed within 30 days of the vacancy for the remainder of the unexpired term by the appropriate official pursuant to subsection (a). Vacancies in legislative appointments shall be filled under G.S. 120-122.

(d) The Commission shall elect one of its members as chairman to serve until the expiration of his term.

(e) A majority of the Commission constitutes a quorum to transact business.

(f) Members shall receive compensation and reimbursement for expenses as provided in G.S. 138-5.

(g) The Commission shall name a Director upon the recommendation of the Secretary of Crime Control and Public Safety. The Director shall serve at the pleasure of the Commission. The Department of Crime Control and Public Safety shall provide for the compensation of the Director and shall provide professional and clerical staff necessary for the work of the Commission. (1983, c. 832, s. 1; 1987, c. 819, ss. 9, 10; 1991, c. 301, s. 1; 1995, c. 490, s. 14.)

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

Effect of Amendments. — The 1995 amendment added "Pro Tempore" in subdivision (a)(2). For the applicability of this amendment, see Editor's note.

§ 15B-4. Award of compensation.

CASE NOTES

Robber was not entitled to benefits after being shot while attempting to flee a convenience store with money he stole from a customer. McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

Injuries to Criminals Not Covered. — The Victims Compensation Fund is not a Workers' Compensation fund for criminals that are injured during their illicit employment. McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

§ 15B-11. Grounds for denial of claim or reduction of award.

Editor's Note. —

Session Laws 1994, Extra Session, c. 3, s. 1, which amended this section, was effective February 28, 1994, and applicable to victims' claims that are pending or are in litigation on or after the date of ratification.

CASE NOTES

The test for contributory misconduct is two-pronged, that is (1) was there misconduct on the part of petitioner and, if so, (2) was that misconduct a proximate cause of the injury? McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

Robber was not entitled to benefits after being shot while attempting to flee a convenience store with money he stole from a customer. McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

Criminals Not Entitled to Compensation. — The Victims' Compensation Fund is not a Workers' Compensation fund for criminals that are injured during their illicit employment. McCrimmon v. Crime Victims Comp. Comm'n, 121 N.C. App. 144, 465 S.E.2d 28 (1995).

OPINIONS OF ATTORNEY GENERAL

Payments made to the victim pursuant to under-insured or uninsured coverage are a from collateral source as defined in § 15B-2, and an award under the Crime Victims Compensation Act will be reduced to the extent that the economic loss will be recouped from under-insured or uninsured coverage. See opinion of Attorney General to Gary B. Eichelberger, Director, North Carolina Crime Control and Public Safety, Division of Victim and Justice Services, — N.C.A.G. — (May 8, 1995).

Chapter 16.

Gaming Contracts and Futures.

Article 2.

Contracts for "Futures."

Sec.
16-4. Entering into or aiding contract for "futures" misdemeanor.
16-5. Opening office for sales of "futures" misdemeanor.

ARTICLE 1.

Gaming Contracts.

§ 16-1. Gaming and betting contracts void.

CASE NOTES

Gaming debts incurred in this State are not enforceable in the courts of this State. MGM Desert Inn, Inc. v. Holz, 104 N.C. App. 717, 411 S.E.2d 399 (1991), cert. denied, 331 N.C. 384, 417 S.E.2d 384 (1992).

Agreement to Purchase Out-of-State Lottery Tickets. — Where the parties entered into an agreement to purchase Virginia lottery tickets and purchased such tickets over a period of time the agreement was void as against North Carolina public policy, violated this section and was unenforceable in North Carolina. Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994), cert. denied, 336 N.C. 778, 447 S.E.2d 418 (1994).

ARTICLE 2.

Contracts for "Futures."

§ 16-4. Entering into or aiding contract for "futures" misdemeanor.

If any person shall become a party to any contract declared void in this Article; or if any person shall be the agent, directly or indirectly, of any party in making or furthering or effectuating the same; or if any agent or officer of a corporation shall in any manner knowingly aid in making or furthering any such contract to which the corporation is a party, he shall be guilty of a Class 1 misdemeanor.

If any person shall, while in this State, consent to become a party to any such contract made in another state, and if any person shall, as agent of any person or corporation, become a party to any such contract made in another state, or in this State do any act or in any way aid in the making or furthering of any such contract so made in another state, he shall be guilty of a Class 1 misdemeanor. (1889, c. 221, ss. 3, 4; Rev., ss. 3823, 3824; C.S., s. 2147; 1993, c. 539, s. 304; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 304, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 16-5. Opening office for sales of "futures" misdemeanor.

If any person, corporation or other association of persons, either as principal or agent, shall establish or open an office or place of business in this State for the purpose of carrying on or engaging in making such contracts as are forbidden in this Article, he shall be guilty of a Class 1 misdemeanor. (1905, c. 538, ss. 1, 2; Rev., s. 3825; C.S., s. 2148; 1993, c. 539, s. 305; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 305, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 17.

Habeas Corpus.

Article 5.

Enforcement of Writ.

Sec.
17-25. Recommittal after discharge; penalty.
17-27. Penalty for false return.
17-28. Penalty for concealing party entitled to writ.

ARTICLE 1.

Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty.

Legal Periodicals. — For survey of 1982 criminal law, see 61 N.C.L. Rev. 1060 (1983).

ARTICLE 5.

Enforcement of Writ.

§ 17-16. Attachment for failure to obey.

CASE NOTES

Cited in Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993).

§ 17-25. Recommittal after discharge; penalty.

If any person shall knowingly again imprison or detain one who has been set at large upon any writ of habeas corpus, for the same cause, other than by the legal process or order of the court wherein he is bound by recognizance to appear, or of any other court having jurisdiction in the case, he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, s. 26; Code, s. 1651; Rev., s. 3581; C.S., s. 2227; 1993, c. 539, s. 306; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 306, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 17-27. Penalty for false return.

If any person shall make a false return to a writ of habeas corpus, he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, s. 28; Code, s. 1653; Rev., s. 3582; C.S., s. 2229; 1993, c. 539, s. 307; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 307, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 17-28. Penalty for concealing party entitled to writ.

If anyone having in his custody, or under his power, any party who, by law, would be entitled to a writ of habeas corpus, or for whose relief such writ shall have been issued, shall, with intent to elude the service of such writ, or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control, of another, or shall conceal or change the place of his confinement, or shall knowingly aid or abet another in so doing, he shall be guilty of a Class 1 misdemeanor. (1868-9, c. 116, ss. 29, 30; Code, ss. 1654, 1655; Rev., s. 3583; C.S., s. 2230; 1993, c. 539, s. 308; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 308, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 6.

Proceedings and Judgment.

§ 17-33. When party discharged.

CASE NOTES

Petitioner's relief for rescission of his Mutual Agreement Parole Program (M.A.P.P.) contract had to come through administrative procedures before the Division of Prisons and the Parole Commission; habeas corpus was not appropriate for obtaining judicial review of the Parole Commission's decision, absent a clear violation of constitutional rights. Freeman v. Johnson, 92 N.C. App. 109, 373 S.E.2d 565 (1988).

ARTICLE 8.

Habeas Corpus Ad Testificandum.

§ 17-41. Authority to issue the writ.

CASE NOTES

Applied in State v. Rankin, 312 N.C. 592, 324 S.E.2d 224 (1985).

§ 17-42. Contents of application.

CASE NOTES

Applied in State v. Rankin, 312 N.C. 592, 324 S.E.2d 224 (1985).

Chapter 17D.

North Carolina Justice Academy.

§ 17D-4. Application of State highway and motor vehicles laws at the academy; authority of Department of Justice to regulate traffic, etc.

Editor's Note. — Session Laws 1993, c. 539, s. 309, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1996

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1996 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina

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MICHAEL F. EASLEY

Attorney General of North Carolina